

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.170LW application for settlement of dispute

CPSU, the Community and Public Sector Union

and

Department of Human Services, Victoria.
(C2005/2376)

State Government Administration

COMMISSIONER GRAINGER

MELBOURNE, 26 OCTOBER 2005

Parental Leave Provisions

DECISION

[1] This matter arises from a notice lodged by the Community and Public Sector Union (CPSU, the applicant) with this Commission on the requisite Form R47 on 7 March 2005 pursuant to the provisions of s.170LW of the *Workplace Relations Act 1996* (the Act), as follows:

“...
NOTICE is given by
CPSU ...

to the Commission in accordance with Clause 12 Disputes and Grievances of the Victorian Public Service Agreement 2004 between CPSU ... and The Department of Human Services ...

The matter in dispute relates to the failure of the employer to apply clause 48. Parental Leave, of the VICTORIAN PUBLIC SERVICE AGREEMENT 2004 and also Schedule 14 of the Workplace Relations Act 1996 as referred to in Clause 48.1 of the said Agreement.

The CPSU contends that Ms. Janice Robertson was denied the right to return to the position she held immediately before she began maternity leave in 2003. The employer contends that it was not required to return Ms. Robertson to the position Ms Robertson held prior to proceeding on maternity leave as the position no longer exists.

Further the CPSU contends that in the event the Commission finds the position no longer exists, the employer has not provided Ms. Robertson with a comparable position that is nearest in status and remuneration to the position she held immediately prior to proceeding on maternity leave.

At the time Ms. Robertson proceeded on maternity leave for a second time in November 2004 she had not been returned to the original position she held prior to commencing the first maternity leave or appointed to a comparable position.

Steps taken by the CPSU to resolve the dispute are as follows:

- *The CPSU has met and conferred with the employer to remedy this situation on numerous occasions.*
- *Ms. Robertson lodged a complaint with the Equal Opportunity Commission. After all of the paperwork was lodged the Commission did not provide Ms. Robertson with the benefit of a conciliation conference and advised her to pursue her complaint at the Victorian Civil and Administrative tribunal.*
- *Two internal grievances were heard by the Department but failed to provide Ms. Robertson with a successful outcome. The CPSU represented Ms. Robertson in these proceedings.*
- *An application to the Australian Industrial Relations Commission was lodged by the CPSU. Conciliation failed and the matter was set down in accordance with s170LW for private arbitration. Directions were complied with by both parties. The employer raised a jurisdictional objection in the paperwork they filed with the Commission. Prior to the matter being heard Abetz and Stephenson (PR952743) (Stephenson) was handed down. The parties met and conferred in an attempt to resolve Ms Robertson's complaint. The CPSU adjourned the hearing to consider Stephenson.*

The CPSU is seeking a hearing in accordance with s.170LW of the Workplace Relations Act to hear and determine these matters in dispute.

*We seek a hearing in relation to this matter at the Commissions convenience.
... ”*

[2] The Department of Human Services (DHS, the respondent) objected to the Commission exercising jurisdiction in this matter and that jurisdictional objection was heard in Melbourne on 17 May 2005.

[3] On 27 May 2005 the Commission as presently constituted issued a decision (PR958289) which found (at [30] thereof) that *“the Commission does have jurisdiction in this matter pursuant to the provision of s.170LW of the Act in relation to the dispute between CPSU and DHS notified to the Commission pursuant to cl 12 of the 2004 Agreement over whether Ms Robertson was denied the right to return to the position she held immediately before she began maternity leave in 2003 and the alleged failure of DHS to provide Ms Robertson with a comparable position in terms of status and remuneration to the position she held immediately prior to proceeding on maternity leave in 2003.”*

[4] The hearing of the substantive application in this matter took place in the Commission on 12-15 September 2005 and 14 October 2005. CPSU was represented by Mr T. Backwell. DHS was represented by Mr J. D'Abaco of counsel.

The Legislation

[5] (1) Section 170LW of the Act provides:

“Procedures in a certified agreement for preventing and settling disputes between the employer and employees whose employment will be subject to the agreement may, if the Commission so approves, empower the Commission to do either or both of the following:

(a) to settle disputes over the application of the agreement;

(b) to appoint a board of reference as described in section 131 for the purpose of settling such disputes.”

[6] Section 170KB of the Act provides:

“170KB Application of Schedule 14

The provisions of Schedule 14 have the force of law, in the same way as if they were set out in this Division.”

[7] Schedule 14 of the Act in relation to Parental Leave, provides inter alia:

“

- *1(1) Under this Schedule, an employee who gives birth to a child, and that employee’s spouse, are entitled to unpaid parental leave totalling 52 weeks to care for the newborn child.*
- *1(8) An employee who takes parental leave is, in most circumstances, entitled to return to the position which he or she held before the leave was taken.*
- *12 (1) This clause applies when an employee returns to work after a period of Schedule 14 maternity leave.*
- *(2) The employer must employ her in the position she held:*
 - (a) if she was transferred to a safe job because of her pregnancy—immediately before the transfer; or*
 - (b) if she began working part-time because of the pregnancy—immediately before she so began; or*
 - (c) otherwise—immediately before she began maternity leave.*
- *(3) If that position no longer exists but she is qualified for, and can perform the duties of, other positions in the employer’s employment, the employer must employ her in whichever of those positions is nearest in status and remuneration to the position referred to in subclause (2).”*

The Agreements

[8] On 13 May 2002 Commissioner Smith of this Commission certified the Victorian Public Service (Non-Executive Staff) Agreement 2001 (AG815866 PR917687) (the 2001 Agreement, Exhibit DHS-4) which contained the following relevant provisions:

(1) Clause 6.3:

“Pre-existing rights, entitlements and practices will be retained in respect of any matter not dealt with in this Agreement (including any Agency Agreement made in accordance with clause 12) as varied from time to time (including variations made as a result of the Career Structure and Work Organisation Review process provided for in clause 11).”

(2) Clause 15:

“15 IMPLEMENTATION OF CHANGE

15.1 Where the Employer is considering a restructure of the workplace, the introduction of new technology or changes to existing work practices of Employees, the Employer will advise the affected Employees and the CPSU of the proposed change as soon as practicable after the proposal has been made. The Employer will advise the affected Employees and the CPSU of the likely effects on the Employees working conditions and responsibilities. The Employer will advise of the rationale and intended benefits of any change.

15.2 The Employer will regularly consult with affected Employees and the CPSU and give prompt consideration to matters raised by the Employees or CPSU and where appropriate provide training for the Employees to assist them to integrate successfully into the new structure.

15.3 In accordance with this clause the CPSU may submit alternative proposals which will meet the indicated rationale and benefits of the proposal. Such alternative proposals must be submitted in a timely manner so as not to lead to an unreasonable delay in the introduction of any contemplated change. If such a proposal is made the Employer must give just cause to the CPSU if the Employer does not accept its proposals. Any dispute concerning the Parties' obligations under this clause shall be dealt with in accordance with clause 16.”

(3) Clause 43.1 and 43.2:

“43.1 Parental Leave

Parental leave means paid and unpaid maternity, paternity/partner and adoption leave and shall be provided in accordance with Schedule 14 to the Workplace Relations Act 1996, subject to the following provisions of this clause.

43.2 Maternity Leave

(a) A female Employee other than a casual employee who has at least 12 months continuous paid service will be entitled to the equivalent of 12 weeks paid maternity leave, to be taken in connection with the birth of her baby either before and/or after

the birth. The Employee will also be entitled to the equivalent of 12 weeks paid maternity leave if she has a miscarriage of her pregnancy where it has advanced to at least 20 weeks. If she is the primary care giver, she will be entitled to a further period of unpaid leave, but the total of her paid and unpaid leave must not exceed 52 weeks. If she does not qualify for paid maternity leave, she will be entitled to take up to 52 weeks unpaid maternity leave. An Employee who has been on leave without pay in excess of 52 weeks does not have an entitlement to paid maternity leave whilst on such leave without pay.

(b) An Employee shall confirm her intention of returning to work by notice in writing to the Employer, given not less than four weeks prior to the expiration of the period of maternity leave. If agreed by the Employer and the Employee, the return to work can be on a part-time basis until the commencement of the child's schooling. If such part-time work is requested by the Employee, the Employer will not unreasonably withhold agreement. It is agreed that the three year limitation on the use of fixed term employment does not apply in these cases”

[9] On 2 June 2004 Commissioner Gay certified the Victorian Public Service Agreement 2004 (AG834607 PR947441) (the 2004 Agreement, Exhibit DHS-5) which contains the following relevant provisions:

(1) cl 7.1:

“Subject to clause 7.2, this Agreement operates to the exclusion of all previous awards and orders of the Commission and replaces all previous certified agreements and Australian Workplace Agreements in respect of the Employees. However any entitlement in the nature of an accrued entitlement to an individual's benefit, which has accrued under any such previous certified agreement or Australian Workplace Agreement will not be affected by the making of this Agreement”.

(2) cl 10:

“10 IMPLEMENTATION OF CHANGE

10.1 Where the Employer is considering a restructure of the workplace, the introduction of new technology or changes to existing work practices of Employees, the Employer will advise the affected Employees and the CPSU of the proposed change as soon as practicable after the proposal has been made. The Employer will advise the affected Employees and the CPSU of the likely effects on the Employees working conditions and responsibilities. The Employer will advise of the rationale and intended benefits of any change.

10.2 The Employer will regularly consult with affected Employees and the CPSU and give prompt consideration to matters raised by the Employees or CPSU and where appropriate provide training for the Employees to assist them to integrate successfully into the new structure.

10.3 In accordance with this clause the CPSU may submit alternative proposals which will meet the indicated rationale and benefits of the proposal. Such alternative proposals must be submitted in a timely manner so as not to lead to an unreasonable delay in the introduction of any contemplated change. If such a proposal is made the

Employer must give considered reasons to the CPSU if the Employer does not accept its proposals.

10.3.1 Indicative reasonable timeframes are as follows:

<u>Step in process</u>	<u>Number of working days in which to perform each step</u>
<i>Employer advises CPSU and employees</i>	
<i>CPSU response</i>	<i>5 days following receipt of written advice</i>
<i>Meeting convened (if requested)</i>	<i>5 days following request for meeting</i>
<i>Further Employer response (if relevant)</i>	<i>5 days following meeting</i>
<i>CPSU alternative proposal (if applicable)</i>	<i>10 days</i>
<i>Employer response to any alternative proposal</i>	<i>10 days</i>

10.4 Any dispute concerning the Parties' obligations under this clause shall be dealt with in accordance with clause 12 (Disputes and Grievances)."

(3) cl 12:

"12 DISPUTES AND GRIEVANCES

12.1 A dispute or grievance must be dealt with in the following manner:

12.1.1 The matter must first be discussed by the aggrieved Employee with his or her immediate supervisor.

12.1.2 If the matter is not settled, the Employee can require that the matter be discussed with another representative of the Employer appointed for the purposes of this procedure. The Employee is entitled to have a representative, including an Accredited Representative of the Union, present at this discussion.

12.1.3 If the matter still remains unresolved it may be referred to the relevant internal review process in the relevant Agency. Where the internal review process is unable to resolve the dispute or grievance, it may be referred by either Party to the Commission for resolution by conciliation and, if necessary, arbitration. Any arbitration includes access to appeal rights, to be applied in accordance with the Workplace Relations Act 1996 and its Rules and Regulations.

12.2 Until the matter is determined, work must continue in accordance with usual practice. No Party or Employee will be prejudiced as to the final settlement by the continuance of work in accordance with this procedure.

12.3 *The Parties must cooperate to ensure that these procedures are carried out expeditiously.”*

(3) cl 48.1:

“48.1 Parental Leave

Parental leave means paid and unpaid maternity, paternity/partner and adoption leave and shall be provided in accordance with Schedule 14 to the Workplace Relations Act 1996, subject to the following provisions of this clause.”

The Evidence

[10] Ms Janice Robertson (Ms Robertson) is and has at all relevant times been an employee of DHS. On 29 March 2003, during the currency of the 2001 Agreement, Ms Robertson took maternity leave pursuant to the provisions of clause 43 of the 2001 Agreement and to which the provision of clause 12(1) - 12(3) of Schedule 14 of the Act applied.

[11] The position Ms Robertson held immediately before she began maternity leave on 29 March 2003 was the position of Manager Service Development at the VPS-5 level (Exhibit DHS-2, cl 9, Exhibit DHS-21, cl 1 and Exhibit CPSU-6). The remuneration range for that position was \$66,010 to \$92,413 per annum and the tenure was permanent and on-going. (Exhibits DHS2, GC-1 and DHS-21, cl 1). Ms Robertson’s actual rate of remuneration at 29 March 2003 was \$80,869.00 per annum (Exhibit DHS-21, cl 3). The job description for that position immediately before Ms Robertson began maternity leave on 29 March 2003 has not been able to be located and was therefore not able to be presented to the Commission in this process (Exhibit DHS-21, cl 2).

[12] Prior to beginning maternity leave on 29 March 2003 Ms Robertson was in discussion with DHS, as part of a wider DHS restructure, about whether her VPS-5 level should be reclassified to a higher level (PN1027). Also prior to going on maternity leave Ms Robertson worked on the new job description for the yet to be established position of Manager Out of Home Care and Specialist Support Services (OHCSSS) (PN1267).

[13] At the time Ms Robertson began maternity leave on 29 March 2003 the position held by her at DHS had a financial delegation of \$5,000.00, four direct reports and 14 subordinate staff with a total staff budget of approximately \$1,000,000 (Exhibit DHS-2, cl 9 and PN1250, PN3025, PN3058, PN3067). The position reported to the Director Child Protection and Juvenile Justice (DCPJJ), held at all relevant times by Ms Callister, which in turn reported to the Executive Director Community Care (PN528, 529). That position in turn reported to the Secretary of the DHS (see CPSU2, attachment 1 and PN530). The position also had policy input in relation to DHS programs with budgets of approximately \$140 million but actual responsibility for those funds lay with DHS Regional Directors (PN3028).

[14] From the time Ms Robertson went on Maternity Leave on 29 March 2003, Mr David Clements (Mr Clements) acted in her position at the VPS-5 level (Exhibit DHS-2, cl 8).

[15] On 4 June 2003 the Victorian Government made its *“Putting Victoria’s Children First”* statement which resulted in additional funding and duties being required to be performed by DHS (Exhibit DHS-2, cl 13 and 14) leading to a substantial increase in the responsibility, workload, political sensitivity and accountability of the managerial role for the

Out of Home Care and Specialist Support Unit (Exhibit DHS-2, cl 15). Amongst the changes affecting the OHCSST area of DHS resulting from this announcement was the establishment of the function of advocate for children in the out of home care system (PN2939). Another major initiative was the development of a quality framework for out of home care services (PN2944). Another change related to regional partnership plans (PN2947). Another new initiative emanating from the Public Parenting Report related to a range of issues concerning variable models of foster care recruitment in Victoria (PN2949).. A further new initiative was the establishment of a Ministerial Advisory Committee involving a Cabinet Minister and representatives of large non-government welfare agencies (PN2951-2952). This function commenced in August 2003 (PN2954). A further initiative involved the establishment of a Sector Development Plan for the out of home care sector (PN2955). All of these initiatives were significant departures from the functions performed by Ms Robertson prior to her taking maternity leave on 29 March 2003 (see eg PN2950). Ms Robertson gave evidence that while she was absent on maternity leave Mr Clements undertook some of the same tasks as she had prior to 29 March 2003 and that some “*additional tasks came into the area*” as well while she was on maternity leave (PN583).

[16] In July 2003 the title of the position held by Ms Robertson at the time she went on maternity leave on 29 March 2003 changed from Manager Services Development to Manager OHCSST at the VPS-5 level (Exhibit DHS-2, cl 7 and 9 and PN951-953). Following the restructure the newly re-titled position had 5 direct reports and 26 full-time equivalent staff (Exhibit DHS-2, cl 9 and PN3024).

The following new job description for the position of Manager OHCSST was implemented from that time (Exhibits DHS-2, cl 9 and DHS-2, GC-1 and DHS-21, cl 1):

“Job Description

Data

<i>Class/Local title (if any)</i>	<i>MANAGER VPS-5 (Out of Home Care and Specialist Support)</i>
<i>Remuneration Range</i>	<i>\$66,010 to \$92,413 p.a.</i>
<i>Time Fraction/Tenure</i>	<i>Full Time 12 month fixed term contract.</i>
<i>Region/Branch</i>	<i>Child Protection and Juvenile Justice Branch</i>
<i>Initial Work Area</i>	<i>Placement and Support Services</i>
<i>Location</i>	<i>20th Floor, 555 Collins Street, Melbourne</i>
<i>Reports to</i>	<i>Director, Child Protection and Juvenile Justice Branch</i>
<i>Information Contact</i>	<i>Lora Harper Telephone [...]</i>
<i>Date of Completion</i>	<i>January 2003</i>

Core DHS Values

- **Professional Integrity:** We treat all people with dignity and respect.
- **Quality:** We always strive to do our best and improve the way we do things.
- **Collaborative Relationships:** We work together to achieve better results.
- **Responsibility:** We commit to the actions we take to achieve the best possible outcomes for our clients.
- **Client Focus:** We work towards improving the health and wellbeing of our clients and community.

Work Environment

The Community Care Division aims to ensure support to families and individuals at critical stages of life, and access to services designed to promote the health and well being of clients and development of their capacity to function independently. This includes a range of services for families including child protection, placement and support and services for juveniles facing the justice system.

The Child Protection and Juvenile Justice Branch has responsibility for legislation, policy, program development, planning, resource distribution, monitoring and review of adoption and permanent care, child protection, juvenile justice and placement and support programs: direct service delivery of the inter country adoption program, court advocacy unit and youth parole board; and program specific contributions to the Youth and Family Services Division's development.

Priorities for Out of Home Care and Specialist Support include consolidation and strengthening out of home care services (including home based care, residential care and secure care) and specialist support services (including Family Preservation Services, Intensive Therapeutic Services, and Intensive Case management Services) to deliver a balanced and effective continuum of services to the target group. The primary role of the Manager, Out of Home Care and Specialist Support will be to focus on the development, redevelopment and review of these services. The Manager is the primary point of contact and source of expert advice within the department for these services and will lead a team of staff investigating and analysing key issues arising from current service delivery and the potential for policy and service redevelopment and service delivery initiatives.

Key Result Areas (KRAs)

- *Lead and support staff to reach their potential whilst maximizing their contribution to achieving organizational goals*
- *Effective management of the development and implementation and evaluation of policy.*

The Person

- *Effective management of the strategic development and design of programs, services, and service standards so that service delivery is effective, efficient and client focused.*
- *Effective negotiation and liaison at senior level with all key stakeholders within the Division, Department, the service provider sector and more broadly as appropriate so that policy and service system development is*

consistent with Departmental policy and reflects agreed priorities and best practice.

- *Preparation of timely briefing papers and reports and provision of authoritative advice and expertise to the Department and the Minister*
- *Provision of leadership and direction to staff and management of effective workplace relationships*

Key Selection Capabilities (KSCs)

Human Services is an equity employer. Selection will be based on assessing an employee's potential for future development and demonstrated good conduct alongside the skills, knowledge, past performance and other personal qualities relevant to the initial work assignment which are listed below.

People Management Skills - *actively fosters learning and development opportunities for staff; manages self and others to achieve personal, team and program objectives; guides and manages the performance of individuals and the team; manages workplace change; and displays interpersonal astuteness, honesty and integrity when dealing with others. (For more details on the above criteria, please refer to the "Enhancing People Management" attachment at the end of this document)*

Desirable

- *An appropriate tertiary qualification in management, law, economics, public policy or relevant human services field.*

Management Capabilities

- **Management Practice** - *understand the skills and approaches required to manage people and resources, including a variety of professionals and project teams*
- **Leadership** - *develop an environment where team members feel confident and able to contribute, lead by example, motivate and seeks ways to develop and improve team members, clearly and convincingly articulate a vision for the team and make team members feel trusted and valued, and are able to achievable organisational objectives*
- **Change Management Skills** - *be able to facilitate and implement change in a complex and sensitive environment and capitalise on innovation and change.*
- **Program/Project Management** - *be able to plan and manage major projects and redevelopments, be effective in financial management and planning, clarify the purchaser/provider relationships, ensure service delivery by business units is effective and client focussed, produce innovative, cost-effective and workable solutions to project/redevelopment issues, and formulate responses to Government priorities in a strategic and timely manner.*
- **Contract Management** - *develop and maintain effective relationships with all stakeholders, help all stakeholders clarify & their needs, define clear tender specifications and performance indicators, manage the tendering process, negotiate a favourable position for the Department, monitor the*

contracted service against the identified performance indicators and respond appropriately to contractual breaches

Personal Capabilities

- ***Cognitive Skills*** - *is perceptive, quick to understand more conceptually demanding ideas, be able to reason through problems and be able to introduce improved and innovative ways of doing things.*
- ***Initiative*** - *be proactive in approach, identify and work towards organisational goals, and accept responsibility above and beyond stated job and generate and promote new ideas*

Communication Capabilities

- ***Persuasion/Negotiation*** - *develop and maintain effective relationships with all stakeholders, be capable of consulting and negotiating at all levels of government and non-government agencies, be flexible in approach and be direct and forceful as well as being diplomatic*
- ***Communication skills*** - *have high level interpersonal skills and prepare and present briefings, reports and correspondence in a manner appropriate to purpose and audience*

Specialist Capabilities

- *Understanding of relevant statutory provisions and services - thorough understanding of current Departmental programs and services and relevant legislative provisions covering child protection and care and placement and support services, and be able to effectively communicate and advocate government policy objectives and the complexities surrounding service delivery in this area*
- *Capacity for high level policy advice - be able to provide high level policy advice to the Minister or significant experience in operating in the political environment*
- *Knowledge and skills in service redevelopment - understanding of and demonstrated experience in developing and implementing major service redevelopment projects in the human services field.*

...”

[17] On 1 November 2003 the position of Manager OHCSSS was re-classified from a VPS-5 level position to a VPS-6 Level 1 range position as a consequence of DHS implementing the new Victorian Public Service Classification Structure (Exhibit DHS-21, cl 5 and PN596). The upper range of salary of the highest VPS-6 position, the VPS-6 Level 2, is \$104,523 (PN1436)

[18] From the middle of 2003 Mr Alan Hall (Mr Hall), the Director of the Research Budget and Program Support Branch of the Community Care Division of DHS at the EO2 level, formed the view “*that the policy and program demands in the placement and support area [of DHS] were becoming more complex and that the management role was better suited to an Executive Officer (i.e., senior management level) classification*” (Exhibit DHS-7, cl 3). This view “*was based on the high level of political commitment to the area, the range of new budget and program initiatives, the increased public scrutiny and the increasing complexity*

and range of unresolved issues regarding service provision” (Exhibit DHS-7, cl 4). Mr Hall prepared a briefing to the Secretary of DHS on 12 August 2003 seeking allocation of an Executive Officer position for the area (Exhibits DHS-7, cl 5 and DHS-2, attachment GC2). Mr Hall initiated this process without consulting Ms Callister, Ms Robertson’s direct superior, but did inform Ms Callister at one point about the fact that “[*he*] was doing it” (PN3395 and PN3527-3528).

In late November 2003, partly as a result of an Executive Officer 3 position becoming available due to restructuring elsewhere in DHS, Mr Hall’s application was successful and an Executive Officer (EO3) position was allocated to the Community Care Division of DHS (DHS-2, cl 21). Ms Callister gave evidence that, in accordance with Victorian Public Sector Employment Standards, DHS could not simply promote Ms Robertson into the newly allocated EO3 position and that Ms Robertson would be required to apply for the EO3 position if she wished to be appointed to it (DHS-2, cl 26). Mr Hall acknowledged, as the key driver of the process for achieving the allocation of the EO3 position, that under the Implementation of Change provisions at cl 15 of the 2004 Agreement, the appropriate time to have consulted Ms Robertson about this proposed “*restructure of the workplace*” which affected her substantive position would have been any time from late November 2003 (PN3537, PN3542). However, the actual filling of the EO3 position was not covered by the 2001 Agreement. Ms Callister gave evidence that it was apparent from late November 2003 “*that the majority of ... Management duties that were in the VPS6 [Manager OHCSSS] as it existed would be subsumed in the EO3 position once it was appointed to*” (PN3069). It was therefore apparent to Ms Callister that if Ms Robertson did not apply for or was not appointed to the EO3 position, “*then there would need to be some significant restructuring of the duties and duty statement of that position*” but “*that there would be capacity for that position to take on some of the duties that would now fill out the new area*” (PN3070-3071). Mr Hall gave evidence that “*an executive officer position is quite different to the nature of any VPS position. That executive officers in fact are charged with the running of the department. They work with a degree of authority, they work with a degree of autonomy and they exercise a level of responsibility that operates a very large and complex department and that goes above and beyond the set of tasks that a particular person might carry out on a day-to-day basis*” and that “*there is no real comparison between a VPS6 position of any sort and an executive officer position.*” (PN3448). Whilst VPS positions are permanent, Executive Officer positions are on a contract for up to 5 years (PN3450).

[19] On 22 December 2003 DHS wrote to Ms Robertson as follows (Exhibit CPSU-2, attachment 5):

“Implementation of New Career Structure - Confirmation of Grade

Further to previous correspondence on the career structure translation advising that you are in the “overgrade” category and may be subject to a review, a decision made at the Australian Industrial Relations Commission (AIRC) requires me to clarify this advice.

As you know, in DHS the intention was for managers to hold discussions with affected staff in January and February 2004, with a view to determining who would be subject to a formal review, and notifying them during that time. However, a decision made in the AIRC by Commissioner Smith on 12 December, regarding the management of the overgrade review process in the Department of Justice, has necessitated an amendment to the planned process and timelines for other departments.

The Commission's decision, meant that DHS had to facilitate the immediate identification of staff for a review and the confirmation of staff that are not subject to a review. This letter is to advise that you have been confirmed in the grade to which you initially translated in the new career structure.

Although the overgrade process has been slightly amended due to the AIRC decision, the objectives remain consistent with details provided to DHS staff at information and briefing sessions. There is still a need for you to have a discussion with your manager to ensure that your work value is aligned with your grade and value range descriptors. As a result of this discussion you may identify a need for your job to be grown or for you to undertake development in the role. This discussion should take place by the end of February in 2004.

Thank you for your patience during this phase of implementation. Please feel free to contact your HR Manager or mail queries to Career.structure@dhs if you have any questions about the content of this letter.

Yours sincerely

Karen Haywood

Director, Human Resources ”

[20] No consultation with Ms Robertson occurred regarding the EO3 position and its impact on the OHCSSS area until Ms Callister, Ms Robertson's substantive direct Manager at the time, telephoned Ms Robertson at her home on 9 January 2004 in compliance with the provisions of cl 15 of the 2001 Agreement (Exhibit DHS-2, cl 28) that:

“Where the Employer is considering a restructure of the workplace, the introduction of new technology or changes to existing work practices of Employees, the Employer will advise the affected Employees and the CPSU of the proposed change as soon as practicable after the proposal has been made...”

However, there is no requirement for DHS to consult in relation to Executive Officer level positions which are not covered by either the 2001 or 2004 Agreements.

[21] During Ms Callister's telephone conversation with Ms Robertson on 9 January 2004, which lasted according to Ms Callister for 30-40 minutes (Exhibit DHS-2, cl 28) and according to Ms Robertson for about 10 minutes (CPSU2, cl 20) and was “*somewhat hurried*” (Exhibit CPSU-2, cl 19), Ms Callister informed Ms Robertson that the Secretary of DHS “*had accepted that the role of Manager OHCSSS had grown to such an extent that it justified the creation of a new executive level management position and that one [Executive Officer level position] had become available as a result of the amalgamation of the Northern and Western Regions*” [of DHS] (Exhibit DHS-2, cl 27) Ms Callister informed Ms Robertson that “*the new EO role had been created as a result of the increasing complexity, responsibility, accountability and profile that the area of work had attracted over the last 12 months while she had been away*” (Exhibit DHS-2, cl 29). Ms Callister emphasised that the allocation of the Executive Officer position “*was a positive development*” (Exhibit DHS-2, cl 29) and Ms Callister “*strongly encouraged Ms Robertson to apply for the new position*” and “*that Ms Robertson would be a very strong candidate*” for the Executive Officer position (Exhibit DHS-2, cl 31). Ms Callister informed Ms Robertson that her substantive VPS-6 role “*would no longer be the manager of the area*” but that position “*would definitely remain*”

(Exhibit DHS-2, cl 32). Ms Callister informed Ms Robertson that if she was unsuccessful in any application for the new Executive Officer position Ms Robertson “*would be found another position in a regional location or in Head Office*” (Exhibit CPSU-2, cl 20). Ms Callister informed Ms Robertson that, as Ms Callister was leaving that day for five weeks leave and a study tour, if Ms Robertson had any queries during that period she should speak to Ms McKinnon who would be acting in Ms Callister’s job or “*to someone in the Human Resources Branch*” of the DHS (Exhibit CPSU-2, cl 19, and cl 20).

[22] On 12 January 2004 Ms Robertson telephoned the Human Resources branch of DHS and “*was advised that the position Ms Callister had spoken of was not my position upgraded and that my position still existed*” (Exhibit CPSU-2, cl 30 and PN686).

[23] On 12 January 2004 Lora Harper, Executive Assistant, Child Protection and Juvenile Justice in DHS, sent the following e-mail to Ms Robertson and others (Exhibit CPSU-2, attachment 8):

“Dear all

I am writing to advise that a new executive officer position of Manager, Out of Home Care and Specialist Support has been created in the Child Protection and Juvenile Justice Branch. Recruitment to the new position will commence later this month, in conjunction with recruitment to the vacant Manager, Child Protection role.

The decision to create this executive officer role is a positive one for the Child Protection program as it recognises the vital importance of this area for the Victorian children and young people who require these services and the challenges which confront the program.

I encourage those of you with an interest in applying for this role to do so and I look forward to the positive impact the new appointment will have in this important area.

Gary McKinnon

A/Director

Child Protection and Juvenile Justice”

[24] On 12 January 2004 Ms Robertson initiated enquiries about lodging a formal grievance with DHS in respect of DHS’s actions as she saw them, in relation to “*her position*” (Exhibit DHS-2, cl 48). She actually lodged her grievance application with DHS on 13 February 2004 (PN1704).

[25] On 14 January 2004 Ms Edith Loch of DHS sent the following e-mail to Ms Robertson and to 33 other DHS Officers (Exhibit CPSU-2, attachment 8):

“Subject: NEW EXECUTIVE OFFICER POSITION

Dear all

A decision has been made to create a new Executive Officer position in the Branch – Manager, Out of Home Care and Specialist Support.

Accordingly, recruitment to the position will commence later this month. Recruitment will occur at the same time as recruitment to the vacant position of Manager, Child Protection.

This decision is a very positive one for this Unit and recognises the importance of our work and the challenges it presents. You will be updated concerning progress as this occurs.

*Regards
DC”*

[26] On 16 January 2004 Ms McKinnon wrote to Ms Robertson as follows (Exhibit DHS-2, GC-5):

“ Dear Janice

I am writing to you concerning the creation of the new position of Executive Officer to manage the Out of Home Care and Specialist Support functions in the Child Protection and Juvenile Justice Branch. As you are aware from your discussions with Gill Callister, Director Child Protection and Juvenile Justice, on 9 January 2004 this position is being created due to the increasing complexity, responsibility and accountability that this area of work has attracted over the past 12 months.

In particular the Ministerial Statement, Putting Victoria’s Children First, delivered in June 2003 gave prominence to issues related to Out of Home Care such as quality improvement and partnership development. This statement also foreshadowed the creation the Advocate for Children in Out of Home Care and the establishment of the Community Care Ministerial Advisory Council.

In addition the restructure of the CP and JJ Branch added the functions related to Permanent Care and Adoption to the Out of Home Care activities thereby establishing a new section to manage all the activities related to Out of Home Care and Child Protection Specialist Services.

These changes and developments have created a significantly higher profile for the area and consequently have expanded the expectations for the ongoing management and development of Out of Home Care and Child Protection Specialist Services.

As with all Executive Officer recruitment this position will be subject to a merit based selection process commencing in late January and you are encouraged to apply in this process. I appreciate that changes of this nature can cause some anxiety so without pre-empting the outcome in any way, I wish to assure you that if you are unsuccessful in an application for this position you will continue to be a senior member of the CP and JJ Branch.

If you have any further queries please do not hesitate to contact your Human resources contact or me.

Yours sincerely”

Ms Robertson then rang Ms McKinnon and Ms McKinnon reiterated that the EO3 position to be advertised was not Ms Robertson’s position, but a new position (PN704, PN1591).

[27] On 24 January 2004 DHS advertised the new Executive Officer 3 (EO3) position under the new title of Manager Placement and Support in the “*The Age*” as follows (Exhibit DHS-2, GC-7):

***“Two Executive Roles in Child Protection,
Placement and Support***

The Victorian Department of Human Services funds or directly delivers a diverse range of services within a broad portfolio. The Child Protection and Juvenile Justice Branch is responsible for legislation, policy and program development, monitoring and review of the adoption and permanent care, child protection, juvenile justice and placement and support programs. The Branch provides high level advice at Ministerial and senior management level on all child protection issues. The Department is seeking to fill two executive level positions, both reporting to the Director, Child Protection and Juvenile Justice.

Manager, Child Protection

The role is responsible for leading and managing the Child Protection Section to achieve improved outcomes for children at risk. This will include the design and development of effective programs and service delivery models for services provision. You will co-ordinate and develop child protection services delivered by both relevant state and non-government agencies and provide expert advice to the Minister, Executive Director and Director on all policy and program matters relating to child protection as well as representing Victoria on national forums. Of critical importance will be to lead innovation and policy reform in child protection in Victoria within the context of Government policy priorities.

Ref No: P1753AG1

Manager, Placement and Support

The role is responsible for leading and managing the Placement and Support operations of the branch to achieve effective outcomes for children at risk. This will involve the redevelopment of a continuum of specialist support services to effectively respond to the range of needs of NGO’s providing placement and support services. The role will require strong stakeholder management to develop and maintain productive relationships with both internal child protection services, as well as the funded sector. You will liaise and work with the Children’s Advocate to establish a quality system of out-of-home care services and provide expert advice to the Minister, Executive Director and Director on all policy and program matters relating to placement and support services as well as representing Victoria on national forums.

Ref No: P1754AG1

Both roles will require professionals with a proven track record in management within a substantial human service organisation such as a public hospital, a community services organisation or a relevant public sector organisation. You will demonstrate high level analytical skill and the ability to apply strategic thinking within a complex environment. Proven experience in high level policy development and reform will be important as well as the ability to lead and achieve significant outcomes in a collaborative manner within a politically complex setting. An understanding of both

Australian and international human services issues including the effects of disadvantage will be important. An executive package will be negotiated for both positions.

To apply in strict confidence, email your resume to execrec@kpmg.com.au or fax to [...] quoting the reference number as indicated.

Further enquiries to Grant Nichol at our Melbourne office on [...]"

[28] On 27 January 2004 Ms McKinnon wrote to Ms Batt of CPSU as follows (Exhibit DHS- 2, GC-6):

"Dear Ms Batt

I was alerted through a discussion with Industrial Officer Mandy Coulson last Friday that you had not yet received advice, which the Department of Human Services (DHS) had intended to forward as a courtesy, regarding a change to the Executive Officer (EO) structure of the Child Protection and Juvenile Justice Branch. In the interest of clarity I am now writing to provide the intended advice.

A new EO position has been added to the Child Protection and Juvenile Justice Branch structure to manage the Out of Home Care and Specialist Support functions. This position has been created in recognition of the increased complexity, responsibility and accountability that has occurred in these areas over the past 12 months. I wish to state clearly that the new EO position is an additional position and will have no impact on the current VPS staffing complement and structure in the relevant work areas.

In our discussion Ms Coulson raised concerns regarding the impact the new EO position would have on the incumbent and the role of the VPS5 position which has previously managed some of the areas which the new EO position will assume responsibility for. This has not been determined at this stage and it may transpire that the current VPS5 incumbent, who is on maternity leave, is the successful applicant for the EO position. The Departments intention throughout has been to await the outcome of the EO process, and if the incumbent VPS5 is unsuccessful in gaining the EO position, to await her return from Maternity Leave before commencing discussion of a new set of duties which are commensurate with the current duties and responsibilities of her VPS5 position.

I trust that this advice is helpful in clarifying any queries or concerns the CPSU may have in relation to this matter. I would welcome further communication in regard to this matter.

Yours sincerely

Mary McKinnon

*A/Director
Child Protection and Juvenile Justice Branch"*

[29] On 27 January 2004, in response to an e-mail from Ms Robertson on 24 January 2004, Ms McKinnon sent an e-mail to Ms Robertson which stated, inter alia, that (Exhibit DHS- , GC-9):

“ Janice,

Thankyou for your email on Saturday. I am sorry that the advertising of this position caused you any distress and I hope by sending you this email clarifying the issues you have raised I can alleviate your concerns. Let me to clarify a few aspects of the current establishment of the new EO position for Out of Home Care and Specialist Support Services.

Firstly as the letter I sent you outlined, this is a newly created position and is not your position reclassified. I refer you to my letter

As you are aware from your discussions with Gill Callister, Director Child Protection and Juvenile Justice, on 9 January 2004 this position is being created due to the increasing complexity, responsibility and accountability that this area of work has attracted over the past 12 months.

I have also spoken to Gill Callister and clarified with HR that this is a newly created position. Essentially your position, at level, will remain in the program area. Discussions about any changed role was thought to be premature as you have been encouraged to apply for the EO position by Gill Callister verbally and in the letter I sent you about this matter.

Secondly it is my understanding that Gilll [sic] Callister informed you that the recruitment for this position would commence in late January. The advertisement is the first step in the recruitment process. The recruitment forewarning was quite distressing, especially considering I was informed by Gill Callister that the recruitment agency would be in touch with me.

I seek your advice now regarding the process that I should undertake because it would appear that the process previously described is no longer valid.

Yours sincerely

Janice Robertson”

[30] According to the documentation of Ms Robertson’s grievance notification to DHS on 6 February 2004 the “*outcome still desired*” by her was that “*when I complete my maternity leave in March 2004 I would like to return to the position that I held prior to commencing Maternity Leave – Out of Home Care and Specialist Support Services with the same duties and responsibilities currently assigned to this role.*” (Exhibit DHS- 2, GC-10).

[31] On 3 March 2004 Ms Callister responded to Ms Robertson’s grievance as follows (Exhibit DHS- 2, GC-11):

“Dear Janice

I refer to your personal grievance lodged with the Human Resources Branch dated 13 of January 2004.

I am concerned at the level of personal distress outlined in your grievance as I had hoped to avoid any anxiety these changes may create through my telephone contact and the written material sent to you. My intention was to inform you of developments in Out of Home Care, not to alarm you. I hope that this response will go some way to establishing a joint understanding of the corporate goals in relation to the creation of this new Executive Officer (EO) position and your personal situation.

From your submission I understand the basis of your grievance is that you consider that your substantive position has been upgraded and advertised whilst you have been on maternity leave.

Rationale for Executive Officer in Out of Home Care.

I would like to reaffirm with you that your substantive position has not simply been upgraded and advertised. The creation of the new position of Executive Officer to manage the Out of Home Care and Specialist Support functions in the Child Protection and Juvenile Justice Branch was as a result of the increasing complexity, responsibility, accountability and profile that this area of work has attracted over the past 12 months. (Attachment 1- Letter January 2004).

From a corporate point of view this is a very positive development for the program as the creation of an EO position will enhance and strengthen the overall development of this critical area of work.

Some of the rationale behind the decision to create this position are;

- *The Ministerial Statement, Putting Victoria's Children First, delivered in June 2003 gave prominence to issues related to Out of Home Care such as quality improvement and partnership development.*
- *The creation the Advocate for Children in Out of Home Care and the establishment of the Community Care Ministerial Advisory Council.*
- *The outcome of the restructure of the CP and JJ Branch added the functions related to Permanent Care and Adoption and consolidated the specialist support functions to the Out of Home Care activities thereby establishing a new section to manage all the activities related to Out of Home Care and Child Protection Specialist Services.*
- *The outcomes of several recent interstate inquiries that have highlighted the pivotal role that Out of Home Care plays in maintaining public confidence in the Child Protection system.*
- *The release of the Pathways to Partnership report and subsequent Ministerial announcement of a review of initiatives and finding to:*

*create a quality framework for OOHC
new recruitment model for Foster Carers
new regional partnership planning initiatives
statewide delivery of foster care training*

These changes and developments have created a significantly higher profile for the area and consequently have expanded the expectations and accountability for the ongoing management and development of Out of Home Care and Child Protection Specialist Services.

Scope of new EO Position

You will see from the attached position description (Attachment 2 - position description) that there are more broadly defined key result areas that focus on the development and redevelopment of a range of aspects of the program and a complementary yet significant emphasis on the executive skill set including strategic thinking, political/social awareness and flexibility. The main elements of the scope and expectations of the new £0 position are summarised below.

Key result areas

- *Effectively lead and manage the Placement and Support Section to achieve improved outcomes for children at risk*
- *Redevelop the continuum of specialist support services to effectively respond to the range of needs presented by clients of child protection*
- *Ensure the effective establishment and development of the Take Two service*
- *Work towards and plan new models of residential and home based care consistent with changing client needs and profiles*
- *Liaise and work with the Children's Advocate to establish a quality system for Out Of Home Care services*

Selection Criteria

- **Strategic Thinking** *- be able to identify or develop overall strategic goals and identify strategies and actions required to achieve these goals*
- **Political / Social Awareness** *- understand and use the power relationships that impact on the role and understand the limitations and nature of the environment, including an understanding of interest groups and informal structures*
- **Flexibility** *- be adaptable and open to new ideas; readily tackle new challenges; accept changed priorities without undue discomfort; recognise the merits of different options and act appropriately*

This new role is therefore significantly different and broader in scope to the one you currently occupy.

While the new EO will assume some of the responsibilities previously assigned to your role the full impact on your role has not been determined at this stage. As it may transpire that you are the successful applicant my intention throughout this process has been to await the outcome of the EO recruitment process. If you are unsuccessful in gaining the EO position, I intended to await your return from maternity leave before reviewing the impact this has on your role. Should this be necessary I intend, as I discussed with you, to fully involve you in this process and expect to provide you with a role that is commensurate with your current skills, knowledge and attributes.

Finalisation of the recruitment process to the EO role is expected by mid to late April. Should you return prior to this selection being finalised it will be to your position of Manager Out of Home Care.

Selection of New EO

In relation to the recruitment process for the EO position as with all Executive Officer recruitment this position will be subject to a merit based selection process that has commenced and you have been encouraged to apply.

Role of CPSU

In relation to the CPSU the union sought to clarify clause 15 and processes related to the change. This was responded to promptly. (Please see attached a copy of the letter provided to CPSU)

Communication

Finally as you know I have been unavoidably on leave for the past 5 weeks and I appreciate that there may have been less misunderstanding had there been a single point of contact. I regret that some confusion appears to have occurred as a result of speaking to a range of people in relation to your concerns. Now that I have returned to my position as Director and Mary Mckinnon has returned to Acting Child Protection Manager please be reassured all future communication from the Branch will be with me which I hope will reduce any confusion from this point forth. Of course you may continue to consult the DHS HR.

Yours sincerely

Gill Callister

*Director
Child Protection and Juvenile Justice”.*

Ms Robertson contacted DHS after she read this advertisement and KPMG, the recruitment consultants handling the EO3 recruitment process, contacted Ms Robertson, obtained her curriculum vitae and gave her an initial interview (PN561).

[32] In mid March 2004 KPMG contacted Ms Robertson again to schedule a further interview with her for 31 March 2004, two days after her scheduled return from maternity leave (Exhibit DHS- 2, cl 58).

[33] Ms Robertson returned from maternity leave on 29 March 2004 and took up the duties of Manager OHCSST at the VPS-6 Level 1 level at the same rate of remuneration as she had been receiving at the time she went on maternity leave on 29 March 2003 (Exhibit CPSU-2, cl 42 and Exhibit DHS- 2, cl 56 and PN956, 961). Ms Robertson gave evidence that she performed some of the functions of the Manager OHCSST but not all of them but acknowledged that she performed the duties of “*a version of the position*” of Manager OHCSST and said that some duties were removed from that position when she returned on 29 March 2004 (PN1787).

[34] Ms Robertson took sick leave on 31 March and 1 April 2004 and her interview with KPMG for the EO3 position was rescheduled for 8 April 2004 (Exhibit DHS-2, cl 60). During this period, on 7 April 2004, the Victorian Auditor General notified DHS that he intended “*to conduct an audit or review of Out of Home Care ... and that was to commence immediately*” (PN2982). Ms Robertson was on sick leave at the time (PN2984). Mr Hall was the DHS Senior Executive responsible for dealing with this audit (PN2987-2988). Mr Hall “*got David Clements to gather a lot of the initial information and do a lot of the preliminary work with the Auditor General’s staff*” (PN2989). Mr Clements was subsequently sent to work with the Child Advocate to assist in establishing the Office of Child Advocate (PN3000).

[35] Ms Robertson subsequently lodged a complaint with the Equal Opportunity Commission of Victoria (EOCV) and declined to attend interviews for the EO3 position until that complaint was dealt with. Ms Callister declined to delay the selection process on this account (Exhibit DHS- 2, cl 61, and cl 63).

[36] Ms Robertson then declined to attend the selection interview scheduled for 28 April 2004, providing a medical certificate stating that she was suffering from work-related stress (Exhibit DHS-2, cl 66).

[37] On 12 May 2004 the EOCV issued its decisions in respect of Ms Robertson's complaint as follows (Exhibit DHS- 2, GC-24):

“Dear Mr Creighton

Complaints by Janice Robertson against State of Victoria - Department of Human Services and Gill Callister - File 301014sc

On 11 May 2004 the Equal Opportunity Commission decided to decline to entertain Janice Robertson's complaints of discrimination on the basis of pregnancy and parental status in the area of employment against the above named Respondents. The Commission made its decision pursuant to section 108(1)(a) of the Equal Opportunity Act 1995 on the basis that it considers the complaints are lacking in substance.

The reason for the decision is that based on the information provided to the Commission, it appears that the decision to upgrade the VPS-5 position to an EO position was in line with a reform agenda set out by the Government to improve services and that it was coincidental that the new position was created and advertised at around the time the complainant was due to return from maternity leave. Also, it appears that the complainant was given the opportunity to apply for the position; that she was able to return to her substantive position and was not demoted and that the respondent attempted to accommodate her so that she could attend an interview. Therefore, there does not appear to be a link between her pregnancy and parental status and the decisions and actions of the respondents in relation to the creation of the EO position.

Under section 108(2) of the Equal Opportunity Act Janice Robertson may, within 60 days of receiving this notice, require the Commission to refer the complaint(s) to the Victorian Civil and Administrative Tribunal, Anti-discrimination List (VCAT) for hearing. You will be advised whether or not this occurs.

Section 109 of the Equal Opportunity Act gives the Respondents the right to apply to VCAT to have the complaint(s) struck out if you believe they are frivolous, vexatious, misconceived or lacking in substance.

*Yours sincerely
Dr Diane Sisely
CHIEF EXECUTOR”*

[38] On 18 May 2004 Ms Callister invited Ms Robertson to attend an interview for the EO3 position on 21 May 2004 (Exhibit DHS-2, GC-25). At this stage all other short-listed candidates had already been interviewed for the position (Exhibit DHS-2, cl 76). Ms Robertson declined to attend on the basis that she had 60 days to consider whether to appeal

to the Victorian Civil and Administrative Tribunal (VCAT) over the EOCV decision (Exhibit DHS- 2, cl 79).

[39] On 25 May 2004 Ms Callister e-mailed Ms Robertson as follows (Exhibit DHS- 2, GC-28):

“ Dear Janice

As I said to you on friday I need to progress and finailse recruitment to the new executive officer position for placement and support. I was hoping you would attend the interview scheduled for 2.00pm Monday 24 may and encouraged you to do so. I also encouraged you to take the morning of 24/5 for further preparation time if you wished.

You asked me on Friday what would be the next step If you did not attend for interview and I advised you no further interview time would be scheduled and the panel would proceed to consider your application on the information provided by you to date. This will now occur and you will be advised of the outcome.

*Please feel free to contact me if you wish to discuss further.
Gill”*

[40] The Selection Panel for the EO3 position proceeded to finalise an appointment to the EO3 position taking into account Ms Robertson’s written application and initial screening interview with KPMG. Ms Robertson was not selected for the EO3 position of Manager Placement and Support. Ms Robertson was informed of this by Mr Hall on 3 June 2004 (Exhibit DHS- 2, cl 83 and PN1969). Ms Robertson gave evidence that this news “*was no great surprise, given that I hadn’t attended the interview*” and that she then said to Mr Hall that DHS “*needed to offer me another position that was comparable*” (PN788). Mr Hall then on 8 June 2004 provided Ms Robertson with a position description of Manager Out of Home Care Quality Improvement (PN788-797). Ms Robertson acknowledged in evidence that Mr Hall actually put to her that DHS wanted “*to try to come up with something which you’re happy with and we can do this in agreement and consultation*” (PN1988).

[41] On 11 June 2004 Ms Robertson lodged a grievance with the DHS Personal Greivance Registrar regarding the selection process for the EO3 position (Exhibit DHS- 2, cl 84). This grievance was not upheld (Exhibit CPSU-2, cl 81).

[42] On 24 August 2004 Mr Clements was appointed to the EO3 position with the title of Manager Placement and Support (CPSU2, attachment 19). Ms Callister gave evidence that this position holds a delegation up to \$50,000, has five direct reports and 26 staff, and oversees a budget of \$1.6 million for programs and a staff budget of around \$2 million (PN3157-3166). The position description of that position states (Exhibit CPSU-2, attachment 10):

***“Job Description
Job Information***

<i>Title:</i>	<i>Manager, Out of Home Care and Specialist Support Services</i>
<i>Classification:</i>	<i>EO-3</i>
<i>Salary on Offer:</i>	<i>State value if capped or leave negotiable</i>
<i>Salary Range:</i>	

Employment Status: Up to 5 year Executive Contract
Work area: Child Protection and Juvenile Justice Branch
Contact for information:
Telephone no:
Reference no:
Applications close:

Core Departmental Values

Professional Integrity: We treat all people with dignity and respect

Quality: We always strive to do our best and improve the way we do things

Collaborative Relationships: We work together to achieve better results

Responsibility: We commit to the actions we take to achieve the best possible outcomes for our clients

Client Focus: We work towards improving the health and well being of our clients and community

- *The Department of Human Services is an Equal Opportunity Employer and values Diversity*
- *The Department of Human Services requires compliance with the Victorian Public Service Code of Conduct*

Work Environment:

The Victorian Department of Human Services is a large organisation responsible for the planning and funding of health, house and community services for the Victorian community. Community Care services support members of the Community at critical life stages, particularly families and young people, and promote their health and well-being and develop their capacity to function independently. The Community Care service system involves a continuum from promotion to prevention, through early intervention to intensive support.

The Child Protection and Juvenile Justice Branch is responsible for legislation, policy and program development, planning, resource distribution, monitoring and review of the adoption and permanent care, child protection, juvenile justice and placement and support programs. Within the branch, the Child Protection Section is responsible for these functions in relation to the adoption and permanent care and child protection programs. The Section provides high-level advice at ministerial and senior management level on all child protection issues.

Purpose of the Job:

The Manager, Out of Home Care and Specialist Support Unit carries responsibility for the policy frameworks, service development and performance monitoring for a range of internal and externally delivered programs supporting vulnerable children and adolescents, the majority of whom are statutory clients of the department. The range of responsibilities includes the direct delivery of the statewide Intercountry Adoption Service. The work in this area is done in partnership with a number of Community Service Organisations and key peak bodies such as CWAV and FCAV through a formal Placement and Support Advisory Group. Many of these members have now also been appointed to the new Community Care Ministerial Advisory Committee. Services are delivered through 84 funded agencies. The program budget responsibility of \$158.8m covers two outputs: Child Protection Specialist Services \$27.3m and Placement and Support Services \$131.5m.

Key Objectives:

These outline the responsibilities and outcomes required of the role in priority order, and form the basis of an individual's Performance Plan.

Effectively lead and manage the Placement and Support Section to achieve improved outcomes for children at risk.

Redevelop the continuum of specialist support services to effectively respond to the range of needs presented by clients of child protection.

Ensure the effective establishment and development of the Take Two service.

Work toward and plan new models of residential and home based care consistent with changing client needs and profiles.

Liaise and work with the Children's Advocate to establish a quality system for Out of Home Care services.

Develop and maintain strong productive relationships with internal child protection services and the funded sector.

Provide expert advice to the Minister, Executive Director and Director, on all policy and program matters relating to Placement and Support Services and represent Victoria on national forums as required.

Provide advice to the Director on funding arrangements and resource allocation to meet the future directions of the program.

Lead and support employees to reach their potential while maximising their contribution to achieving their goals and outcomes.

Selection Criteria:

Selection will be based on the skills, knowledge and personal attributes that are required for achieving the key objectives listed above. Demonstrated conduct in line with DHS values, past performance and the potential for future development will also be considered.

Criteria

- **Leadership** – clearly and convincingly articulate a vision; make subordinates feel trusted and valued; act as a role model to inspire and motivate others, and seek ways to improve their own contribution and increase the level of responsibility of themselves and others.
- **Management Practice** – understand the skills and approaches required to manage people and resources to achieve quality, sustainable outcomes; experience in managing complex direct services.
- **Cognitive Skills** – be perceptive, intelligent, quick to understand more conceptually demanding ideas; be able to reason through problems, and demonstrate their ability to introduce improvements and innovation for regional operations.
- **Strategic Thinking** – be able to identify or develop overall strategic goals and identify strategies and actions required to achieve these goals.
- **Team Building** – listen to and build on the ideas of others; demonstrate respect for others and solicit their opinions; put the good of the group above their own needs; share wins and successes; encourage resolution of conflict within the group, and help establish common objectives so that team members work together in a productive way.

- **Political/Social Awareness** – understand and use the power relationships that impact on the role and understand the limitations and nature of the environment, including an understanding of interest groups and informal structures.
- **Initiative** – generate and promote new ideas and options, be proactive.
- **Interpersonal Skills/Persuasion/Negotiation** – relate well to all kinds of people; build appropriate rapport; win concessions without damaging relationships; convince other of your point of view; listen to and assimilate information from others to identify their needs; identify and assess a range of possible options; be direct and forceful as well as diplomatic; present information in a manner appropriate to purpose and audience.
- **Project Management** – consult and liaise with key stakeholders; develop clear project plans, and manage the project to deliver outcomes that meet quality, cost and time specifications
- **Flexibility** – be adaptable and open to new ideas; readily tackle new challenges; accept changed priorities without undue discomfort; recognise the merits of different options and act appropriately
- **Writing Skills** – prepare briefing and reports using clear, concise language; include content appropriate for the purpose and audience
- **Specialised Knowledge** – a sound knowledge and understanding of current Australian and international Child Protection issues and service delivery standards

...”

[43] Since that time DHS has offered Ms Robertson a range of positions at the VPS-6 position all of which she has declined as being unacceptable to her (see DHS-7 AGH13, and PN858-938).

[44] On 4 November 2004 Ms Robertson went on a second period of parental leave from which she is due to return on 4 November 2005 (PN576). At that time her VPS-6 Level 1 level salary had increased incrementally to \$84,000 (PN1466).

[45] CPSU is seeking an order from the Commission pursuant to the *Workplace Relations Act 1996* directing that DHS appoint Ms Robertson to the EO3 position of Manager Placement and Support, to which Mr Clements was appointed on 24 August 2004, on the basis that this is the nearest position in status and level to the position Ms Robertson held before she went on parental leave on 29 March 2003 (see CPSU-5, cl 102 and PN2658). The base salary of an EO3 position is \$110,000, some \$25,000 per annum more than Ms Robertson’s current VPS-6 Level 1 salary (see PN1451-1466). In the alternative CPSU seeks an order from the Commission directing DHS to provide Ms Robertson with a position equal in status and remuneration to the position she held before she went on maternity leave on 29 March 2003 (see CPSU-5, cl 103).

[46] Mr Hall gave evidence that on Ms Robertson’s return from her current period of parental leave, DHS intends to appoint her to the position of Project Manager Unifying Quality Framework at the VPS-6 level located in the Early Years Branch of the DHS Melbourne head office. This position reports to an EO3 level senior officer of DHS. This position will have one direct report.

The CPSU Submission

[47] The CPSU filed the following written submissions (Exhibit CPSU-1):

“Background

Ms Robertson has worked for the Department of Human Services for sixteen years.

Ms Robertson was appointed to the position of Manager, Service Development within the Child Protection and Juvenile Justice Branch of the Department of Human Services in 1999 (CP&JJ). This management position was responsible for the out of home care and specialist support services. Ms. Robertson reported to five Branch Directors over the next four years and always received positive performance appraisals and was provided with opportunities to act in higher duties assignments over this time. Ms Robertson has been responsible for services in excess of \$100 million dollars.

As is usually the case, positions evolve and grow over time, particularly when the person filling the role is competent and enthusiastic. This occurred with Ms Robertson’s role. The expansion of Ms Robertson’s role included an increased number of staff reports and the assignment of a number of large, complex and politically sensitive projects. Some of those included:- Audits of Children in Out of Home Care, a Residential Care Capital Strategy as well as a major project namely the Intensive Therapeutic Services Development which is now known as Take Two.

Ms Robertson’s career was progressing well. She was being recognized for her skills, had been a valued employee of the Department, was responsible for a large budget and a substantial number of staff. She was satisfied in her role and felt valued. She could never envisage herself being in the situation in which she now finds herself.

Upon the commencement of Ms Gill Callister as the Director of the Branch in early 2002, and Ms Robertson’s line manager, a restructure of the Branch was announced. An independent consultant was appointed to examine all roles within the Branch. Consultation occurred with staff and the CPSU in accordance with the VPS Certified Agreement.

In March 2003 the new structure was finalized and Ms Robertson’s role was retitled Manager Out of Home Care and Specialist Support Services.

Ms Robertson’s retitled position assumed all of the previous responsibilities as well as additional responsibilities including the responsibility for adoption, permanent care and Inter Country Adoption Services and was responsible for an additional 16 staff as well. Ms Robertson was now responsible for 30 staff and services worth in excess of \$130 million dollars per annum.

It must be noted at this point that Ms Robertson was now responsible for the largest group of staff and had the most diverse responsibilities and duties of all of the non executive officer positions within the Branch. Ms Robertson also had three staff, at the same level as herself (VPS 5) reporting to her. In fact she had more staff and a larger budget than the two Executive Officer positions that reported to Ms Callister. At no point was there any discussion or even the suggestion that Ms Robertson’s position should be reclassified. In fact on 22 December 2004 Ms Robertson received advice

from the Human Resources Branch of DHS that her position was “overgrade” and may have to be expanded.

Ms Robertson developed the position description for her restructured role which accommodated the changed duties and responsibilities.

Ms Robertson was due to proceed on maternity leave and recommended that Mr David Clements act in a temporary capacity in her role until she returned. Mr Clements had worked well reporting to Ms Robertson over a five year period Ms Robertson had managed Mr Clements in another work are prior to taking up her current position). On Ms Robertson’s recommendation, Mr Clements was appointed to the acting role.

On the 29 March 2003 Ms Robertson commenced maternity leave. Ms Robertson maintained contact with the staff during this time.

During the Christmas and New Year period, Ms Robertson was contacted at home by Mr Clements, who wanted to know Ms Robertson’s intentions regarding returning to work. Ms Robertson thought it was inappropriate for Mr Clements to contact her and ask her these questions, as she did not have to indicate her intentions until four weeks prior to the expiration of her maternity leave. Also Ms Robertson felt that she should have this discussion with her manager, not someone who usually reported to her. Nonetheless, Ms Robertson told Mr Clements that she would be returning to her position on a full-time basis at the end of her maternity leave. Mr Clements indicated during that telephone call that he did not wish to return to his substantive position upon her return, as it was a lower status position even though it was at the same level.

Ms Robertson did not suspect that Mr Clements would have his sights set on assuming her role particularly given that she had worked with him for over five years and had strongly advocated for him to act in her role.

There had been no contact with Ms Callister, her manager, until the 9 January 2004 which was within two weeks of Mr Clements telephone call. Ms Callister rang Ms Robertson at home and advised her that she had decided to appoint an Executive Officer to manage the area Ms Robertson managed as the things had “become more complex” during the eight months that Ms Robertson had been away. Ms Callister advised Ms Robertson that she could apply for the “new” role and if she was unsuccessful in her application, she would be assigned another role in Head Office or a region as her role no longer existed. Ms Callister was in a hurry at the time she contacted Ms Robertson as she would be absent from work for the next five weeks. Ms Callister contacting Ms Robertson under such hurried circumstances made this contact appear like an afterthought on Ms Callister’s part or, more likely, because the decision to take this action had just been made.

Ms Callister was not encouraging towards Ms Robertson to apply for the “new” role nor did she in any way indicate that the change provided an opportunity for Ms Robertson. In Ms Robertson’s view, Ms Callister was cold and matter of fact as she explained how she had restructured Ms Robertson out of her job whilst on maternity leave.

There is no doubt that Ms Callister did not advocate for the position to be reclassified when additional duties were added following the restructure because she had no

intention of allowing Ms Robertson to be reclassified with the position. Ms. Callister's actions are consistent with her having deliberately waited until Ms Robertson was not in the position before putting forward a case to reclassify the position. There is little doubt Ms Callister would not have taken this action if Ms Robertson had not taken maternity leave. She had ample opportunity to do this using the correct process when the restructure of the Branch occurred and yet she chose not to.

Ms Callister claims that Ms Robertson's position had changed to such an extent that it could no longer be deemed to be her position, rather a "new" position. The CPSU is very ready and very willing to demonstrate to this Commission the lack of integrity to this line being advocated by the Department. The positions are identical.

Restructuring senior Departmental women out of positions whilst on maternity leave is not new to Ms Callister, as the CPSU has had to defend another member not that long ago with the same complaint. Ms. Callister in that case managed to convince an internal grievance hearing that she had managerial prerogative to take this action even though it is the CPSU's view that her actions contravened the Departments internal policy, the certified agreement provisions and Schedule 14 of the Workplace Relations Act.

Ms Robertson argues that the "new" position is not new and that it is simply the position she agreed to prior to commencing maternity leave. Ms Robertson argues that she should not have to apply for her own position and adamantly believes that it is her position and the CPSU supports this view.

A glaring observation for the CPSU has always been the lack of consultation in accordance with the VPS certified Agreement and these concerns were raised by the industrial officer responsible for this department back in January and have been raised at every opportunity since.

The lack of meaningful and genuine consultation is a very important aspect, which has been overshadowed by the dispute in relation to the alleged abolition of Ms Robertson's role and the alleged creation of a new job. The alleged breach of consultation was also raised and acknowledged in the Departmental internal grievance hearing, but once again its importance has been undervalued. Clause 10 of the current agreement reads identically to the old Clause 15 in the previous VPS agreement and provides for very clear stepped obligations on the part of the employer to consult in a genuine way. In this case, a decision rather than a proposal was made and after the event they advised Janice. At no stage did she have any opportunity to effect change to any concepts or proposals. They simply told her after the event.

Ms Robertson had intended to apply for her own position, whilst still on maternity leave, having no child care arrangements and trying to juggle a baby between unrealistic interview times. Ms Robertson found herself being told when she must attend interviews instead of them trying to work in with a woman on maternity leave trying to organize her life around a baby and being told she didn't have a job to come back to. It is no surprise that Mr Clements, the person acting in Ms Robertson's role was also an applicant. Mr Clements rang Ms Robertson at home to tell her that Ms Callister had personally encouraged him to apply for the position in dispute. Ms Callister did not encourage Ms Robertson to apply in this way.

Ms Robertson became alarmed at the Department's lack of encouragement and compassion, and lodged an internal grievance within the Department. Ms Robertson lodged this application on the 6 February 2004. She was not due back from maternity leave until the 29 March 2004.

Ms Robertson received a response which was not satisfactory. By this stage the very Ms Robertson was very alarmed and stressed by the situation which she was finding overwhelming.

On the 17 March Ms Robertson lodged a complaint with the Equal Opportunity Commission.

The EO Commission, without detailed examination of the facts before it declined this complaint which can only be appealed to VCAT. Ms Robertson was then faced with the decision to refer her complaint to VCAT which can be costly and timely, apply to this Commission or reapply to have an internal grievance heard. Ms Robertson at that time reapplied via an internal grievance.

When she returned from maternity leave, Ms Robertson walked into a very hostile environment. Ms. Callister barely spoke to her and was unfriendly and officious when there was no choice. It was clearly evident that Ms. Callister resented Ms Robertson's questioning of her actions and her attempts to have the situation independently reviewed. Ms Callister also removed and reassigned to Mr Clements and others, some of Ms Robertson's most important duties without any discussion with her whatsoever. This was humiliating for Ms Robertson.

Ms Robertson was being pressured into being interviewed for her position at times which were unreasonable i.e. 6.00p.m. at night with the hill time care of a baby and a partner interstate. Ms Robertson was in a very vulnerable and highly stressed state and for the first time in many years, accessed her sick leave. She believed that she was being victimised and was terribly anxious about attending an interview with a hostile and biased selection panel. Ms Robertson was also concerned that if she was interviewed then this be construed as her acceptance that the position was not hers.

This very argument was used against one of her colleagues at a Grievance Hearing and was successful.

Ms Robertson was subsequently advised that she was not the successful applicant. This came as no surprise to Ms Robertson or to anyone who had observed this situation. Following this she lodged a Selection Grievance.

In the meantime, discussions took place regarding an alternative, comparable role within the Department. Ms. Callister will have you think that Ms Robertson has been unreasonable in what she believes is comparable although it is submitted that there have been no reasonable, comparable positions offered thus far and a critique of the positions offered to Ms Robertson can be provided.

It was evident at the Grievance Hearing that upholding Ms Robertson's Grievance would be too great a responsibility for the Grievance Officer to allow. The CPSU industrial officers in the DHS team are no longer encouraging members to pursue internal grievances because of the farcical outcomes. They are not encouraging their members to put themselves through a process that appears corrupt. There has not

been one CPSU assisted grievance which has resulted in a successful outcome for any member for the entire year.

The Department selected “independent” Grievance Officer did not find in favour of Ms Robertson and although he held some sympathy for her position, he was quick to encourage the parties to meet and confer about alternative positions. This occurred and to date have not led to anything substantial.

Upon receipt of the grievance outcome, the CPSU advised the Department that an application was being made to the AIRC and requested that they refrain from making an appointment to the position until it was ascertained whether it was in fact Ms Robertson’s position. The Department ignored this request and have appointed Mr Clements to the position.

The decision to appoint Mr Clements prior to the matter being heard by the AIRC was a deliberate and calculated act by the Department to prejudice Ms Robertson in seeking justice and is another example of the mean spirited, manipulative and mischievous behaviour of some of the most senior officers of this Department.

In addition, whilst Ms. Callister has attempted, ever so awkwardly, to bypass this Commissions jurisdiction by reclassifying a VPS5 position (now VPS6 position after translation) to an EO position which is beyond the scope of the VPS agreement, it must be remembered that the Department had a clear responsibility to consult both Ms Robertson and the CPSU, allow Ms Robertson to have a stress free maternity leave and allow her to return to the position which she held prior to commencing on maternity leave and only if it genuinely no longer existed, a position comparable to her skills and experience. None of these things occurred.

Ms Callister took the opportunity afforded by Ms Robertson taking maternity leave to remove her from her position. Why she took this action given Ms Robertson’s unblemished career history within DHS is unclear.

There was never a “real” position available to Ms Robertson. Nothing was done prior to June 2004 to prepare a Job Description. The positions she was subsequently offered were never advertised, no one else was ever considered for them and they did not appear on any organisational charts.

What has happened in this case is exactly why protection for women has had to be enshrined in Awards, Agreements and Federal Acts. Cases like this are classic examples of why the ACTLJ is spending so much time and money on trying to protect families struggling to find a balance with work, careers and family responsibilities because it is reasonable to enjoy all of these things without prejudice. It has taken a long time to get to this point of recognition. Allowing a senior DHS officer to interfere with and distort a long and hard earned career as punishment for also wanting a family is nothing short of appalling.

Lack of Consultation

Section 15 (now clause 10) of the VPS Agreement states that management is required to consult with affected employees whenever they are considering a change to workplace structure or practices. The union is also required to be consulted and the requirement extends to the union or employees putting forward alternative proposals

to that being proposed by management before a decision has been made. It doesn't need to be stated that Ms Robertson, despite being on maternity leave, should have been treated as if she was at work. The requirement to consult is not obviated by the fact that an affected employee is on maternity leave. In fact this situation means it is even more important that an affected employee is approached by management as the employee does not have the benefit of the office grapevine and is likely to be more vulnerable than would normally be the case: Gibbs v Australian Wool Corporation (1990) HREOC 11.

Clearly this did not happen in this case. Ms Robertson was rung and, in a hurried conversation with Ms Callister who was commencing 5 weeks leave within hours of the phone call, effectively advised that her position no longer existed. This was a high handed, thoughtless and insensitive way to deal with this situation. The manner in which the change was conveyed also lacked any awareness or sensitivity to the post natal condition of Ms Robertson. The fact that she was being told her salary and level would be maintained is irrelevant. Clearly the decision being conveyed to Ms Robertson had enormous ramifications for her both in terms of retaining her seniority and also in terms of her career progression. It was not open to Ms Robertson to do other than acknowledge what she was told. There was clearly no opportunity being offered for her to seek a reversal of any decision that affected her.

If Ms Robertson had not been away on leave it cannot be conceived that the restructuring of her position, and her position only within a Branch of in excess of 100 staff, would have proceeded without prior consultation with her: Gibbs v the Australian Wool Cooperation (1990) HREOC 11. Ms Robertson was an experienced employee who had given satisfactory service to her employer for 16 years, it could have been expected that she would be consulted about changes affecting her role.

In terms of management prerogative and business needs, it was also unreasonable when all circumstances are considered. There was not a pressing need to deal with this situation. Ms Robertson was not due back at work for another three months and Ms Callister, obviously a key player in this action, was not going to be available for any further discussion for at least another five weeks. In addition, if you accept the reasons that Ms Callister gave Ms Robertson for this action, most dated back many months, the restructure having occurred six months previously. What was the urgency? Ms Callister gaining permission to appoint a new Executive Officer to her area does not explain why she treated Ms Robertson the way that she did.

Clearly Ms Callister did not think the situation regarding Ms Robertson was sufficiently important to thoroughly brief Ms McKinnon about the situation in her absence because when Ms Robertson raised the issue with Ms McKinnon some three weeks later she had not even looked at the Position Description and appeared to know little about the situation. Well, she certainly didn't know enough to call Ms Robertson back to discuss the situation further as she undertook to do.

DHS's prime reason for not consulting Ms Robertson was that she was the only person affected by the changes. I'm sure Ms Robertson did not find comfort in this claim. In fact, quite the opposite — why was she being singled out? Secondly this claim is blatantly untrue. Changes of the nature being proposed never only affect one person, in fact the alternative position that was hurriedly offered to Ms Robertson in early June affected the structure of the entire area and changed the reporting relationships of a number of staff These staff had already been through a comprehensive restructure

that commenced in 2002 and continued through 2003 (in fact it was a protracted process that went on for 8 months) - they also had a right to be consulted about what management had in store for them.

After much prompting from CPSU, DHS eventually wrote to the union to advise them that the changes did not affect the “staffing complement and structure of the relevant work areas”. This is not the case. They also claimed that the full impact on “the incumbent” had not been determined. What is meant by this statement is difficult to comprehend particularly in light of the fact that DHS has vigorously argued that it was a “new” position therefore Ms Robertson wasn’t the “incumbent”. It can only be concluded that they didn’t know what they would do with Ms Robertson. Their claim that they would discuss this with her when she returned from maternity leave I’m sure did not provide her with a great deal of reassurance given the manner in which they had dealt with her to date. If this was an attempt to be sensitive to the fact that Ms Robertson was on maternity leave, then I can assure you that her piece of mind had already been shattered and during this time she was frantically attempting to organise urgent child care for her 8 month old baby so that she could return to work and increase her chances of retaining her role.

The requirement to consult regarding such changes has been agreed to by DHS in recognition of the impact that work place changes can have on employees — not only on their work output and productivity but also their health and wellbeing. Also people are more likely to accept decisions in which they have been included. When someone is absent from the workplace and the proposed action is likely to be controversial, then it is even more important that this requirement is adhered to. It is difficult to comprehend that such a senior DHS manager, Ms Callister, could have acted with such blatant disregard for a condition of a certified agreement without purpose.

Right to return to role held prior to commencing maternity leave

Women who take maternity leave have a legislated right to return to the role they held prior to commencing maternity leave through the legislative minimum standards in the Workplace Relations Act and the VPS Agreement.

In addition the Federal Government as a member of the International Labour Organisation has equality obligations under Article 11 (2b) of the Convention on the Elimination of all Forms of Discrimination against Women that commits it to ensuring

11 (2b) To introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances.

The guaranteed right to return to the same job in addition to paid maternity leave are considered the provisions most likely to assist women to maintain job continuity, training and career progression (WEL submission to HREOC re Valuing Parenting 2002).

Legislation is necessary because employers do not always demonstrate industrial fair play in this regard and many women returning to work have found that someone else, usually someone not likely to have a baby in the near future, has taken their role. The negative impact on their career progression and future earning potential goes without saying and is well documented. Much research exists to demonstrate that having a child severely impacts on women’s financial security and is a primary contributing

factor to them entering old age in a much more impoverished position than men. The current Work and Family Test Case being argued before the Commission is hearing much evidence about discriminatory practices that affect women's labour market participation and in turn impact negatively on their financial situation.

Despite legislation protecting women from workplace discrimination it is still widespread. In 2001 the number of complaints of pregnancy discrimination under the Sex Discrimination Act increased by 150% on the previous year (Elaine Thompson WEL Conference 12/6/04). Overall complaints of this nature rose from 8% of all complaints in 80s to 25% of all complaints by 2004 (Goward — media release 13/6/04). What appear to be concrete legislated rights can clearly be nibbled into ineffectiveness.

Ms Robertson spent a great deal of time and effort whilst she was supposed to be on maternity leave and caring for her baby, trying to understand her situation by piecing together the contradictory accounts she had been given. She sought clarity from DHS on numerous occasions without any success. On the one hand she was told her job still existed and certainly a position still existed with the same title and duties as her current role. However she was told that she must apply for this position and despite having competently fulfilled all of the duties of this role, was given no encouragement from her manager whatsoever. This is in direct contrast to the person who acted in her role during her absence. He happily telephoned Ms Robertson to boast that he had received personal encouragement from Ms Callister.

On the other hand Ms Robertson was told that she would be found a role commensurate with her "current skills, knowledge and attributes". This is quite a different set of criteria to "comparable position" which is mandated by legislation. She was also told by a colleague that an announcement had been made at a staff meeting that there were now two jobs with the same title and duties. In spite of this, Ms Robertson's many years of service in her particular area made it blatantly obvious to her that there would unlikely be a comparable job available — even if her manager eventually came to the view that this was a different set of criteria to that of "current skills, knowledge and attributes".

This left Ms Robertson in a very difficult position. If she participated in the selection process she was concerned that she was forfeiting her right to return to her former position as this could be construed as providing tacit acknowledgement that the job being recruited to was not in fact her job. In fact this had been successfully argued by DHS at a Grievance Hearing in relation to a very similar situation less than a year previously. I will quote from the report of the Determination of the Grievance:

DHS Submission

Ms Callister argued that the Manager, CA U position, is a new job. It is a VPS 5 position with a different management role than that held by the previous Senior Legal Officer. She stated that the previous Senior Legal Officer position was retained and not reclassified to that of the Manager Position.

Ms Callister also argued that Ms X had previously applied for the Manager position when it had been advertised and this indicated that Ms X understood that a merit selection process was required. Ms Callister argued that the fact that the position was advertised meant Ms X understood it was a new job."

Consideration and Assessment of Issues

“It seemed clear also that Ms X expected to undergo a competitive merit selection process as part of filling this position as she had previously applied for the position when it was first advertised. This indicates that she understood that the (position) was a new job.”

Ms Robertson was also worried that if she didn't participate in the selection process then this could be construed that she was effectively forfeiting her right to return to her previous position. Ms Robertson tried very hard to get advice about what she should do however no one could provide authoritative advice because the situation was so complex and convoluted.

Ms Robertson's health and wellbeing were severely affected by what was happening in relation to her work situation. She was having difficulty sleeping and was avoiding social situations where people might inquire about her work situation.

In the interim Ms Robertson completed her application and attended an interview with KPMG. This was done under very difficult circumstances as Ms Robertson had the fulltime care of her 8-month-old baby and she had no one she could leave him with during the day so that she could attend to these tasks. This did not appear to be of any concern to her employer and was further compounded when she was asked by KPMG to attend a second interview at 6pm on the same day as the telephone call — less than 7 hours notice. She was later told by Ms Callister that she had had at least as much notice as other applicants, which is quite frankly difficult to believe.

Had Ms Robertson's role changed in her absence?

DHS has given various reasons for the decision to upgrade Ms Robertson's role whilst she was on Maternity Leave. Generally she was told that things had become “more complex” in the period between Ms Robertson commencing Maternity Leave (effectively April 2003) and when Ms Callister telephoned her in January 2004 — approximately 8 months. The reasons that have been advanced have changed over time and varied it appears, according to the audience. They do not withstand scrutiny.

One of the first reasons Ms Robertson was given was that her role had assumed additional duties following the restructure in 2003. Well this was obvious at the time and yet Ms Callister took no action. Let it be clear that Ms Robertson was the incumbent at the time that these new duties were defined and written into her job description.

The 2003 restructure added significant additional responsibilities (3 additional program areas — permanent care, adoption and intercountry adoption) to Ms Robertson's role and increased her staff management responsibilities from 18 staff to approximately 30 staff, however these changes were not even considered by Ms Callister to merit an increase in salary. In fact Ms Robertson was advised in December by DHS HR that her job was considered “overgrade” and may have to be “grown”. There was no suggestion that the position would have been upgraded or the salary increased if Ms Robertson had not taken maternity leave: Thomson v Orica Australia P/L (2002) FCA 939.

Ms Robertson agrees that the position had expanded and evolved in the four years she occupied it. This presented constant new challenges to her. None of the changes

that occurred in the period that Ms Robertson was on maternity leave were of the magnitude that warranted the position being upgraded when compared to the magnitude of the growth in responsibilities assigned to this position prior to Ms Robertson commencing maternity leave.

The reasons that were given to the Secretary in order to gain her agreement to this change referred to “activities that have taken place in the past few years”. Most of these activities Ms Robertson had been responsible for managing —

- audits of the safety and wellbeing of children in out of home care and implementation of a quality improvement strategy including regular reporting on progress to meet specified objectives and benchmarks*
- public and media interest regarding the incidence of children in care using volatile substances (chroming)*
- issues in relation to the adequacy of funding in residential care and agencies threatening to stop providing services*
- issues in relation to the operation of the foster care system and the adequacy of reimbursement provided to foster carers*
- concern about the fabric of residential care services and the implementation of a multi year capital redevelopment project*
- issues in relation to the safety screening of volunteers and staff working in out of home care services*
- development of new baseline service standards for residential and home based care services*
- implementation of the Looking After Children framework*
- establishment of therapeutic treatment services for children and young people who have been abused or neglected*
- changes to the information system recording service utilisation and a number of quality indicators*

Another reason Ms Robertson was given was the Branch had had an additional Executive Office position assigned to it that they must now fill — as if this was out of the control of Ms Callister. Executive Officer positions are not just assigned. Manager’s must pursue additional positions if they represent a change to their Executive Officer profile. There is a well documented process regarding this action. Changes to the profile must be approved by the Secretary or Executive Staffing and Remuneration Committee and changes to overall numbers for the Department must be approved by the Premier as the Minister for Employment. While this may sound like a lengthy and complex process I can assure you it happens and another Executive Officer has been appointed to the Branch since the situation commenced.

The timing of such action is entirely up to management's discretion. Why didn't Ms Callister attempt to do this when the position underwent significant changes following the restructure?

Also concerning is that part of the rationale that was provided to the Secretary was that "Recent recruitment action has been unable to secure a suitable person to manage this area of work at the level currently being offered (VPS5)." It is not clear as to why recruitment action would be being taken to fill a position that was not vacant. If the action referred to was the recruitment to fill the position whilst Ms Robertson was on maternity leave, then the person who was recruited to backfill Ms Robertson's VPS 5 position has since been appointed to the EO3 position — obviously Mr Clements quickly developed from being unsuitable at the VPS5 level to being highly suitable at the EO3 level.

The decision to upgrade the position during Ms Robertson's maternity leave demands scrutiny.

The intention of the legislation in using the phrase — "right to return to the position held immediately prior to commencing maternity leave" is not intended just to convey a job grade or classification. Rather, if the position still exists with the same duties, same tasks and responsibilities, then the person has the right to return to that position. In the words of Allsop J (Thomson v Orica Australia .P/L (2002) FCA 939 p.50) — this accords with a common sense approach to the social issues to which the policy and the JR Act were directed It also accords with how selection occurs in DHS — people have to apply for positions and must demonstrate that they meet the Key Selection Criteria including those relating to specialist knowledge and experience — they are not merely assigned to positions on the basis of level and salary. Ms Robertson was denied the right to return to her position because management had arbitrarily decided that the position was now worth more money. She has also been denied the right to return to anything comparable.

Treatment upon return to work

Ms Robertson returned to her role when she completed her maternity leave. However it was made blatantly obvious to her this was only a temporary arrangement until the selection process was complete. In fact it had clearly been management's desire to complete the process before Ms Robertson returned to work, hence the limited notice she was given for interviews and the criticism she received for not attending.

Ms Robertson returned to a hostile and unsupportive environment. Her manager made no effort to meet with her and her duties were progressively removed from her. At the same time as Ms Robertson was being victimised and humiliated in the workplace, her Manager was taking every opportunity to document how supportive and encouraging she was of Ms Robertson applying for the "new" position and that she was a very strong candidate. This situation was truly bizarre. Ms Robertson found it very difficult to cope under these circumstances and raised a number of incidents which had been very distressing to her with the Director of Human Resources to enlist her assistance. No assistance was forthcoming and the situation continued. In desperation Ms Robertson's partner took the extraordinary step of contacted the Director of Industrial Relation to discuss the situation as Ms Robertson was returning from work at the end

of each day very distressed. Despite four telephone calls to this person and messages left, he did not ring Ms Robertson's partner back.

Let me remind you, this situation occurred in a department, which has spent much public money on glossy brochures detailing its values and promoting itself as an organisation where people are at the heart of its success. This department has a huge Human Resources Branch and legal advice at its fingertips as to how to deal with complex human resources issues. Advice was clearly not sought or not followed.

It is not generally recognised how difficult it is for an employee to initiate a complaint — particularly one that relates to allegations of discrimination. It invariably leads to tension and ostracism in the workplace. Added to this is the embarrassment of having to go over the details in the compulsory grievance process and then again at the AIRC :Gibbs v the Australian Wool Cooperation (1990) HREOC 11

Was Ms Robertson offered a comparable role.

It was clear as early as late January when Ms Robertson spoke to Ms McKinnon after she saw the position advertised, that she was not comfortable with what was happening. In spite of this, DHS maintained the line that they would find something for her if she was unsuccessful in retaining her role as Manager Out of Home Care and Specialist Support and this would be negotiated when she returned from Maternity Leave. It would have been reasonable to expect that DHS should have planned what to do with Ms Robertson if she didn't retain her role at the time that they were considering reclassifying her current role. This would have been responsible and reasonable management practice. Ms Robertson is quite senior and highly experienced — they should have turned their attention to how she may be deployed in the future. Despite DHS's claim that they would negotiate with Ms Robertson when she returned from Maternity Leave, there was nothing in the behaviour toward her since the situation first commenced in January 2004 that would suggest she should have faith in this process.

In fact the roles that Ms Robertson was offered after she was removed from her position confirmed Ms Robertson's fears — there wasn't a real position — available to her. Of the four positions for which Position Descriptions were provided — none appeared on any organisational chart at the time that they were offered to her. The Positions didn't exist before they were offered to Ms Robertson — they had never been advertised and no other person had been considered for the position prior to them being offered to Ms Robertson. They were positions that appeared to be of little consequence to the organisation or duplicated what was being done elsewhere in the organisation. Ironically it appears to be DHS's belief that Ms Robertson should be grateful that they would create a position for her.

Ms Robertson was also offered another position — Manager of Secure Welfare- which isn't even vacant. The incumbent is on 12 months Leave Without Pay. Despite DHS claims that "she won't return" it doesn't appear that they have even asked her about her intentions. Also Ms Robertson was advised by DHS Industrial Relations Branch that they would prefer if she attend an interview for the role — just for appearances — however the position would be assigned to her. So much for merit selection.

Ms Robertson was also placed under considerable pressure by Ms Callister and Mr Hall to consider moving to Mental Health Branch or Office of Housing. When she

declined this advice she was made to feel that she was being difficult. As already stated — Ms Robertson has spent her entire 18 year career in child welfare. DHS sponsored Ms Robertson's post graduate Masters of Social Work in this area. It would seem unreasonable and unfair that Ms Robertson was pressured to move to another area, particularly at a time when she was attempting to re-enter the workforce after maternity leave. This treatment is yet another example of how appallingly DHS have treated Ms Robertson.

Ironically the only position which appears on the organisational chart which has become vacant in Ms Robertson's workplace during this entire episode was advertised and given to another person by way of promotion - Manager Quality and Compliance. Ms Robertson heard about this after the event. She was never contacted about this position or offered it.

DHS appear to be of the view that if they maintain Ms Robertson's salary and level then they have discharged their legal obligations to her and she can't really complain. This is simply not the case. Numerous legal decisions document that maintenance of salary does not constitute comparability in terms of role and status. Commissioner Lewin (The Australian Journalists Association and the Special Broadcasting Service 1990) found that ignoring the essential characteristics of work, and in this case journalistic work, and the career aspects of that work, talking into account only gradings, award conditions and the generality of duties would be fatuous and a reductionist analysis. Ailsop J (Thomson v Orica Australia P/L (2002) FCA 939) criticised the respondent for ignoring the duties and responsibilities of a position and relying only on the matrix of skills of a particular level. DHS have attempted to run a similar argument in this case by stating that because the Key Selection Criteria are different in the "new" position then it is not Ms Robertson's' position — irrespective of the fact that the duties and tasks are the same.

It is clear that the action that has been taken deprives Ms Robertson of status and substantial career opportunities. Reassignment to any of the roles that have been offered to her represent a clear demotion and loss of status as evidenced by reduced range of staff reports, reduction in responsibilities including reduced budget management or no budget management and, changes in status relating to reporting relationships.

Why has DHS treated Ms Robertson in this way

The most difficult question to answer is why Ms Callister would not want Ms Robertson to return to her position, especially considering that the duties, responsibilities and accountabilities are not altered.

Ms Robertson diligently performed all tasks of her position achieving all performance requirements in a complex and continually changing environment. Ms Robertson successfully achieved all these requirements during political and management changes.

Of all the indignities, humiliation and victimisation Ms Robertson has suffered the biggest causes of her distress has not known what she has done to deserve this treatment.

Ms Robertson has seen a trusted colleague, Mr Clements, who she supported and mentored, turn against her and join a campaign against her — seemingly so that he

could assume her role; Ms McKinnon acted in a brutish manner toward her; Mr Hall treated her in an unfair manner by not adhering to the bare minimum of informing her of her appeal rights; and, Ms Haywood, whose responsibilities include the consistent application of Department policy, abrogated her responsibilities and offered no support or assistance whatsoever even when all she was asked to do was to stop Mr Robertson being victimised in the workplace. When Ms Robertson tried to take her complaint to an independent forum (EOCV), DHS used the expensive legal resources at its disposal to firstly drag the process out and then to arm itself against her. Fortunately Ms Robertson knows the DHS and the Branch in which she worked for many years are not exclusively represented by the actions of these people.

Does the prospect of a mother of a young baby returning to full time work create such apprehension or evoke such moral judgement that, under other circumstances where these people would behave reasonably, they act so covertly and with such disregard for another person? Management prerogative does not give Ms Callister a reason, only a method for attempting to achieve a distasteful objective. The worst thing about all of this is that the objective, to remove Ms Robertson, is detrimental to DHS's objectives, especially given that the person appointed to her rightful position was not suitable and documented as such.

The conclusion reached is that Ms Callister, whose actions have been inconsistent, devious and harassing, has a personality conflict with Ms Robertson. Ms Robertson does not agree with every aspect of the way in which Ms Callister conducts the business of the program but respects her position and conducted herself in a professional way with Ms Callister.

Opportunities aplenty were available to Ms Callister to directly clear up any misunderstanding or fears raised from her January 9 conversation with Ms Robertson, but made no attempt to do so. When Ms Robertson returned to work Ms Callister attacked her without provocation, apart from Ms Robertson not yielding to a fate planned by Ms Callister.

Ms Robertson, though yet to be told why Ms Callister wants to discard her, has every reason to be wary of Ms Callister's words. Ms Callister's actions however, have been plain and transparent.

How now should Ms Robertson act? While it is hard to remain composed under the circumstances, any sign of emotion may be construed as an inability to perform management tasks. A lack of emotion may suggest that she has not suffered.

It is little different to the choices for interview — attend and fall prey to tacit acknowledgement, or not attend and allow Ms Callister to claim that Ms Robertson did not participate and therefore has forgone any rights to her position, presumably because she didn't want it.

Ms Robertson believes that she has a legislated right to return to her position. The position exists and no comparable position can be found or created. Ms Robertson wishes to return to this position."

[48] The CPSU filed the following closing submissions in the Commission (Exhibit CPSU-5):

“1. This is an arbitration of a dispute in accordance with s. 170 LW of the Workplace Relations Act 1996 and clause 12 of the Victorian Public Service Agreement 2004 (AG2004/3481), hereafter the VPS Agreement.

2. In arbitrating this dispute the roles and functions of the Commission as defined by the objects of the Workplace Relations Act 1996 include:

Object (e) providing a framework of rights and responsibilities for employers and employees, and their organization, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them

Object (i) assisting employees to balance their work and family responsibilities effectively and the development of mutually beneficial work practices with employers. The Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Family Responsibilities Convention) is Schedule 23 of the WRA.

Object (j) helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status family responsibility pregnancy, religion political opinion, national extraction or social origin.

3. Section 93 of the WRA also requires the Commission to take account of the principles embodied in the Sex Discrimination Act (1984) Section 93A requires the Commission to take into account the Families Responsibilities Convention.

4. Object (k) assisting in giving effect to Australia’s international obligations in relation to labour standards.

5. Relevant conventions include:

ILO Convention (No 156) Concerning Equal Opportunities and Equal treatment for Men and Women Workers: Workers with Family Responsibilities – Article 1, Article 4 and Article 7

ILO Convention (No111) Concerning Discrimination in Respect of Employment and Occupation;

ILO Convention (no183) Maternity Protection Convention – Article 8 – A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

6. The contentions of the CPSU have been articulated in the previously lodged Form R47 and detailed in the original Outline of Submission by the CPSU.

7. Jurisdictional matters were considered in separate proceedings (No. C2005/2376 of 27 May 2005). Jurisdiction was granted to the applicant.

8. The CPSU alleges that the Department of Human Services (DHS) has breached clause 48 of the VPS Agreement and schedule 14 of the Workplace Relations Act 1996 as referred to in clause 48.1 of the said Agreement.

9. Clause 48 (1) states:

48.1 Parental Leave

Parental leave means paid and unpaid maternity, paternity/partner and adoption leave and shall be provided in accordance with Schedule 14 to the Workplace Relations Act 1996, subject to the following provisions of this clause...

Schedule 14, clause 12 states:

12. Return to work after maternity leave

(1)

This clause applies when an employee returns to work after a period of Schedule 14 maternity leave.

(2)

The employer must employ her in the position she held:

(a) if she was transferred to a safe job because of her pregnancy—immediately before the transfer; or

(b) if she began working part-time because of the pregnancy—immediately before she so began; or

(c) otherwise—immediately before she began maternity leave.

(3)

If that position no longer exists but she is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ her in whichever of those positions is nearest in status and remuneration to the position referred to in sub-clause(2).

16. The CPSU submits that this case has two basic questions to be considered:

1. Does Ms Robertson's position still exist? If it does then she should return to it in accordance with the Workplace Relations Act 1996.

2. In the alternative, if the position no longer exists then the Department of Human Services (DHS) must offer a position nearest in status and remuneration to her previous position.

Each question has two alternatives: A & B.

17. The CPSU will submit that in the answer to 1., A) the 'position' as defined in schedule 14 does still exist and consequently it should be available for Ms Robertson to fill that role. B) In the alternative to a finding that the position does not exist, the CPSU will argue that VPS Agreement and Act protect against the removal of a position if done in a manner which attempts to avoid statutory obligations.

19. In the alternative, should those submissions not be agreed to, the CPSU submits A) that for the purposes of Cl. 12(3) of Schedule 14 of the Workplace Relations Act 1996 the position nearest in status and remuneration is the position Manager, Placement Support (previously Manager Out of Home Care and Specialist) being classified under the VPS executive structure as an EO 3. B) Alternatively, the positions currently being offered by the DHS are not nearest in status and remuneration to the position she has formally held.

The purpose of schedule 14 of the Workplace Relations Act 1996

20. *In relation to the intention of Parliament in creating the provisions of the Workplace Relations Act 1996 (WRA) that are under consideration the CPSU wishes to make the following submissions.*

21. *The CPSU submits that Schedule 14 reflects the intention of Parliament to safeguard the employment of women who take maternity leave in recognition and acceptance of the fact that pregnancy is an important social function and that women have the right to combine work, pregnancy and family. This accords with a common sense approach to interpreting the legislation and is preferred over an interpretation, which places form over substance.*

22. *Provisions regarding the safeguarding the employment of women taking maternity leave were first placed in awards following the Parental Leave Test Case in 1990 with the purpose being to increase the participation and attachment of women to the workforce, and reduce the risk of women becoming disengaged from the workforce through the taking of maternity leave, with the resultant loss of labor to the economy and reduction in living standards and economic independence.*

23. *Its intent is to protect women from managerial prerogative being exercised in a discriminatory manner while not providing a barrier to genuine changes in business requirements which may require management to restructure their workforce.*

24. *Schedule 14 also seeks to implement some of Australia's obligations from the International Labour Organisation Workers with Family Responsibilities Convention 1981. The purpose of the provision is to restore the status quo ante of the mother in relation to her employment during pregnancy, maternity leave and return from maternity leave.*

25. *Sub section 1(2) of the WRA is mandatory: she must be employed in the position she held. The purpose of this provision is to restore the status quo ante. The only exception relates to if that position no longer exists.*

1. Does Ms Robertson's position still exist? If it does than she should return to it in accordance with the Workplace Relations Act 1996.

'Position'

26. *Critical to the CPSU submission is the definition of the word 'position' as used within schedule 14.*

27. *As 'position' is not defined in the Workplace Relations Act 1996. we must look to judicial comment to determine its definition and application in this case .*

28. *Review of the case law reveals that 'position' has been the subject of some consideration by Courts and Commissions in Australia. The consideration has been primarily in relation to termination of employment and reinstatement in the context of unfair dismissal or return to work after workplace injury. In this matter before the AIRC there is no question of termination of Ms Robertson. The judicial comment is nonetheless persuasive in relation to considering this issue.*

29. *Most recently The High Court of Australia discussed the definition of 'position' in relation to reinstatement provisions of the Workplace Relations Act 1996 as remedies in*

relation to unfair dismissal. This was in the case of Blackadder v Ramsey Butchering Services Pty Ltd [2005] HCA 22 (27 April 2005).

30. *Haynes J. considered the construction of s. 170 CH (3) (a):*
(3)

If the Commission considers it appropriate, the Commission may make an order requiring the employer to reinstate the employee by:

(a) reappointing the employee to the position in which the employee was employed immediately before the termination.

31. *S. 170 CH has close parallels to the return to work provisions in Schedule 14 – the use of the words 'immediately before' is similar to cl. 12 (2)(c) of the said schedule.*

32. *At paragraph 43 his Honour stated:*

"Position", when used in s 170CH(3)(a), refers to the place in the employer's commercial structure that the employee occupied before termination. It refers not only to the pay and other benefits that an employee may earn in a position, but also to the work that the person filling that position does. It follows that an employer, ordered to reinstate an employee by reappointing the employee to the position in which the employee was employed immediately before the termination, not only must recommence paying or providing the financial or other benefits attached to the position, but also must put the employee back to the performance of those duties which the employee was fulfilling before termination.

33. *This nexus of position with 'duties' has also been considered in a number of other cases: The Federal Court Case of Ramsey Butchering Services Pty Ltd v Blackadder [2003] FCAFC 20 (21 February 2003) is worthy of mention. This is the case that resulted in the appeal to the High Court considered above. Moore J., whose decision was the one supported by the majority of High Court, followed the juridical trail in relation to the consideration of the term position.*

34. *He considered the cases State Rail Authority of New South Wales v The Honourable Justice Bauer (1994) 55 IR 263 (and in the related matters of State Rail Authority of New South Wales v Tyrrell (1993) 49 IR 236 at 240-241 and State Rail Authority of New South Wales v Tyrrell (No 2) (1993) 51 IR 14 at 19-20).*

35. *The matters related to reinstatement arising from a dismissal in connection with a work related injury. Quoting from Sheller JA in Bauer:*

"Bauer J...when he came to construe the legislation...suggested five possible meanings of the word "position": "(a) the actual job which the worker was doing when he was injured (b) the actual nominal job classification in which the worker was employed at the time of the injury (here Storeman, Class 3) (c) a job which whilst not the same as that being done at the time of injury is similar both in wages or in the level of 'fitness' required (d) a job which, though requiring a lower level of fitness, was suitable for the level of fitness of the worker after the injury (e) a job that the worker was actually doing at the time of the dismissal".

36. *Point e) has parallels with the High Court approach to the concept of position in Blackadder.*

37. *In Illawarra County Council v Federated Municipal & Shire Employee's Union of Australia (1985) 11IR 18 the Industrial Commission of New South Wales considered a case closer in fact to the matter at hand. Mrs. A Meurer was employed by the Illawarra County Council as a clerk paid on the 10th year incremental scale and went on maternity leave on 4 April 1983. During the leave there was a re-organisation of the staff and her duties were spread amongst the most senior of the remaining staff. On her return she accepted, under protest a position that was paid on the 8th year of the incremental scale.*

37. *The Commission considered the provisions of the Industrial Arbitration Act detailed at 19 of the case report. As can be seen there is substantial similarity with the WRA provisions. Glynn J. considered the purpose of the provision and concluded at 20:*

In my view, that the legislature sought to attain by the insertion of PART XIVA was that an employee, on return from maternity leave, would take up again a discrete set of duties at the same level in the hierarchy of the employer's organisation and at the same level of salary or wages as she had been so placed and had so received before proceeding on that leave.

38. *He continues:*

If the discrete set of duties previously undertaken by her had disappeared on her return she was to be offered other duties carrying as close as possible the status and salary or wages of her pre-leave position...

The offered position might be higher, equal or lower in status and salary or wages when compared with her former position.

39. *In Thomson v Orica [2002] FCA 939 the respondent argued that position related only to position within the "career ladder" and the "matrix of skills saying little or nothing about the duties and responsibilities". The magistrate rejected this as not according with the policy at which s66 of the IR Act was directed. And that the applicant in not being reassigned her former tasks, duties and responsibilities when she returned to work after maternity leave; the applicant was not being given her former position back.. The CPSU submits that the definition of "position" adopted in these cases is the definition that should be adopted by the commissioner in arbitrating this dispute.*

What does the phrase 'No longer exists' mean?

40. *Applying the construction of position in the manner indicated by these judicial authorities the CPSU therefore submits that the phrase 'no longer exists' in relation to a position would mean that the duties and tasks of the job no longer exists.*

Application of the facts in the present matter. – does the position still exist?

THE POSITIONS HAS THE SAME DUTIES

41. *Both Ms Callister and Mr Hall gave evidence of additional responsibilities added to the position which they claimed were new and differentiated it from Ms Robertson's position. Mr Hall gave evidence that this was a major consideration in his decision to take the action that he took. in seeking to establish the EO3 position. In describing these*

additional responsibilities Ms Callister and Mr Hall both referred to discrete and specific tasks that the position was require to undertake. For example – implement the Quality Assurance Framework, implement the Take Two Services, develop a sector development plan, attend Ministerial Advisory Committee, liaise with the Advocate.

42. *The liaison with the Advocate was a new responsibility that was announced during the time that Ms Robertson was absent on maternity leave. Ms Robertson gave evidence that when she returned from maternity leave these tasks was handed back to her by her replacement and she continued to undertake this task until she was removed from her role.*

43. *The strongest evidence to indicate that the position held by Ms Robertson prior to her departure on maternity leave still exists arose from the DHS witnesses. In the cross examination of Ms Callister at Pn3228 she agrees with the question that the 'majority' of the management responsibilities are subsumed into the EO 3 position duties of the VPS 6.*

44. *The CPSU submits that tasks arising from policy and program development work constantly changing otherwise such positions would be time limited. New priorities emerge due to technological change or political inclination and old priorities disappear either because the associated tasks are completed move into a new phase or because they are no longer considered to be important. This does not mean that the fundamental and core duties of a position change but sometimes the focus of the work, the tasks that are required to be undertaken change. This, the CPSU submits, is the approach that should be taken in reviewing whether or not a position still exists within an place of employment.*

45. *Mr Hall's evidence in relation to requirements of the position does not provide any assistance in relation to this issue because "requirements" of a person to fill a position are entirely different to the duties attached to a position which is what case law has determined constitutes the breadth of this issue.*

THE POSITON MANAGES THE SAME RESOURCES

46. *In the respondents submission it is claimed that there has been a significant increase in the workload and funding to the area and that this was one of the reasons an EO 3 level manager was required.*

47. *In relation to workload increase in evidence in chief Ms Callister also claimed that the "volume of work increased enormously"(PN2957). Mr Hall also stated in evidence in chief that "...we had a lot more to respond to than had previously been the case".(PN3454). Ms Haywood also gave evidence that the "department was increasing the capacity of that area". (PN3860).*

48. *In spite of these claims Mr Clements gave evidence that there had been no increase in staff since the restructure was implemented in June 2003. (PN3648) Therefore the staffing at the point that Mr Clements was appointed to the EO3 position was exactly the same complement as that managed by the VPS 6.1 position, which Ms Robertson held.*

49. *Therefore the Ministerial statement which Ms Callister claims led to significant increases in workload had no impact on the staffing complement of this area. Ms*

Callister's statement that the position that had been offered to Ms Robertson in June 2004 and which she claimed was maintained in order to increase capacity in the area (PN3297) had not been filled (PN3299) is surprising given the claims that she made in relation to increased workload.

50. *It is instructive to recall Ms Haywood, a senior Human Resources practitioner in the VPS noted that "Within the Victorian Public Service it is a work-value approach" rather than a workload approach in determining position descriptions. (PN 3913).*

51. *In summary, in spite of Ms Callister's and Mr Hall's evidence that the workload had increased and, Ms Haywood's evidence that the capacity to undertake this work was being increased, no additional resources were added to the area after the restructure that was implemented in June 2003 – prior to the Ministerial statement being made and therefore prior to the alleged increase in work volume.*

52. *It is important to restate that the restructure of 2003 in which Ms Robertson fully participated prior to commencing maternity leave led to her being appointed to the position of Manager, Out of Home Care and Specialist Support, and this is the position which the respondent agrees was her substantive position at the time she commenced maternity leave even though all the staff changes had not been fully implemented prior to her commencing maternity leave in March 2003 (some staff were also transferred out). Overall this restructure increased her direct reports by one and her overall staffing by another fifteen it was considered not have substantially changed her position and so she was appointed to this role without having to undergo a merit selection process. Refer Exhibit 4 CPSU 3 which it identifies Ms Robertson's position of Manager Out of Home Care and Specialist Support as a "fundamentally unchanged position".*

53. *In relation to budget increases, the respondent submitted and Ms Callister also gave evidence that there had been a sufficient increase in budget to the area Ms Robertson previously managed and that is was one of the reasons leading to the decision to appoint an EO3 to manage this area.*

54. *Under cross examination Ms Callister stated that the quantum of the increase that occurred after Ms Robertson commenced maternity leave amounted \$1.6 million dollars, which was allocated, on a non recurrent basis (PN 3164). In a budget of \$150 million this is hardly significant and is also significantly less than the budget increases Ms Robertson had been required to deal with in the previous few years, a 55% increase in funding to residential care (\$30 to 43 million), approximately \$10 million per year for the capital redevelopment strategy, an additional \$5.5 million annually to establish and operate the Take Two Services, and an additional \$2. 1 million in 2002/03 to implement the Looking after Children.*

55. *Although Ms Callister gave evidence that Ms Robertson did not have budgetary responsibilities she conceded that the budget management responsibilities in relation to the overall budget for the service that the position manages is the same irrespective of the level of the position. The primary difference in relation to the financial aspect of the position is the financial delegation that each position holds which goes without saying.*

56. *The only response the organization appears to have made to this alleged increase in funding, workload and "intense political and organizational pressure" (PN3012) was to change the classification of the manager's position.*

57. The respondent has provided submissions at GC-2 stating that the program area has responsibilities for \$158.8M in budget, yet through PN 3131 to PN 3144 the respondent confirms that there is no difference between the manner in which these budgets are administered from the program area whether the position is a VPS5 / VPS6.1 or an EO-3 because neither position directs the activities of the Regional Directors, nor in fact does the Executive Director of Community Care. Though the respondents have denied Ms Robertson's claim that she was responsible for this budget (PN 1223 to PN 1258), it is now a matter of evidence in transcript that there is no difference between the two positions in this regard.

58. In relation to budgetary responsibility, the respondent's submitted at dot point 50 of DHS 1 that the "successful applicant would have responsibility for a budget in excess of \$150 million". with Ms Callister claiming that Ms Robertson never had this responsibility as budget management occurs at the regional level. (DOT Point 19 of DHS3) Under cross examination Ms Callister conceded that Mr Clements also did not have budgetary responsibility in accordance with her definition of budgetary responsibility, as the arrangements in relation to Regional Directors being responsible for budget expenditure had not altered (PN3142) with the change in classification of the Manager's position.

59. The budget responsibilities for this position have not changed in any significant way as has been detailed in the Ms Robertson's submissions. Evidence provided by Mr Clements at PN 3654 shows that he assessed the additional funding for the quality assurance work as "a small amount".

60. It is the CPSU submission that the increase in budget in the year that Ms Robertson was absent on maternity leave was minimal at best and did not in any way impact on the core duties of her position.

61. The evidence that delegation to expend funds is related to classification level is not the relevant issues of consideration in relation to program budget oversight.

THE POSITION IS LOCATED WITHIN THE SAME LOCATION IN THE ORGANISATIONAL STRUCTURE AND HAS THE SAME REPORTING RELATIONSHIPS AS MS ROBERTSON'S POSITION

62. Along with most of the same duties, the E03 position has the same reporting relationships (upwards and downwards) of the position held by Ms Robertson before the commencement of maternity leave.

THE POSITION HAD THE SAME TITLE

63. At PN 2258 Ms Robertson gave evidence that the title of the position was changed on the day that Mr Clements was appointed to act in it. This decision appears to have been made in the thirty minutes which elapsed between the sending of the first and second emails (Attachment 18 of CPSU 2).

THE POSITION IS PAID AT A DIFFERENT RATE TO THE POSITION MS ROBERTSON HELD

65. *It is submitted that this issue is the least relevant in relation to answering the question as to whether the position still exists. It is relevant should the position be determined not to exist in relation to cl. 12 (3). This is because remuneration may not reflect the duties attached to a position as evidenced in this case. In spite of Ms Robertson having responsibility for the largest number of programs and staff in the branch in which she worked she was paid less than her peers who also managed entire program areas – Manager Juvenile Justice and Manager Child Protection (Attachment 1 CPSU 2).*

66. *Ms Robertson also gave evidence that even after the restructure of 2003 was implemented her salary was not increased as Ms Callister expressed the view that the position remained substantially unchanged. (refer Exhibit 4 at 2.1 of CPSU 3) Even though the salary band of Ms Robertson’s position had an upper level of \$101,000 and overlapped with the EO3 salary band which commenced at \$100K at the time.*

CHANGE IN DUTIES

67. *Under cross examination Mr Clements conceded that the majority of the increase in his area occurred following the restructure that occurred before Ms Robertson commenced maternity leave (PN33702) coming fully into operation in the months after she commenced maternity leave.*

68. *Mr. Clements also gave evidence that the most significant initiative arising from the Ministerial statement was the quality assurance strategy for out of home care services which reelected the reports which had been under development in the last one to two years (2001/02). (PN3651) Mr Clements later described this initiative as a “systematic approach to monitoring compliance with two sets of standards, the residential care and the home-based care standards” (PN3654)*

69. *Ms Robertson gave evidence that the development service standards had been her responsibility and work which she undertook before commencing maternity leave and that the development of these standards was a necessary first step in implementing quality assurance processes.*

‘Position’ with the VPS and the Workplace Relations Act 1996

70. *Some of the confusion evident may arise from a difference in perception in relation to the concept of ‘Position’ in the VPS as opposed to ‘position’ as considered in the Workplace Relations Act 1996. There was strong reference to the division between Executive Officers and the Non-Executive Officers. However, a reading of the Act in the manner submitted by the CPSU is a much more expansive one leading to an interpretation, we submit, that is more within the intention of Parliament to protect women’s rights in relation to maternity leave.*

71. *The CPSU therefore respectfully submits this course of action to the Commission should it agree with our submission:*

1. *Make a finding that the DHS has breached the obligations under the VPS Agreements and the Workplace Relations Act 1996*
2. *Direct the DHS to restore Ms Robertson to the position she held prior to her maternity leave*
3. *Any other order that the Commission sees fit.*

1. B) That the legislation provides protection against non-genuine or unreasonable changes in work practices and structure done in an effort to avoid the obligations detailed in Schedule 14 of the WRA.

72. To turn now to the alternative submission to the first question: Obligations in the Workplace Relations Act 1996 must be fulfilled by employers and employees. They must be fulfilled in good faith and not be done in such a way to avoid those obligations either deliberately or by an act of omission. This secondary obligation is implied in the primary obligation. The CPSU submits that the lack of consultation in the creation of the position is evidence of an effort to restructure the VPS 6 position while Ms Robertson was on maternity leave.

Analogy – non-genuine redundancy

73. The situation is analogous to the concept of 'non-genuine redundancy' which enables the AIRC to review a dismissal on the grounds of redundancy as to whether the dismissal was genuinely for reasons of redundancy or for other reasons which would give the character of the dismissal being harsh, unjust or unreasonable under s. 170HB of the WRA. (*C A Sward v Kone Elevators Pty Ltd of Tasmania - 1553/98 S Print R0340 [1998] IRCCommA 1717 (24 December 1998)*).

74. Clearly, unless the Commission has the power to investigate and determine the reasonableness and genuineness of a decision to remove a position, it cannot make an adequate determination as to whether the position still exists for the purposes of Schedule 14 of the Act.

75. The CPSU submits that the lack of consultation, the mixed messages and the deliberate or accidental delay in finally appointing Mr. Clements to the position leads to the conclusion of action taken by the Department in order to avoid obligations under the WRA.

76. It is important to assess the behaviour of management during this period, especially now knowing that the reasons for their restructuring decision changed after a silence of 8 weeks.

77. Using terms including 'complexity, responsibility, significance, sensitivity, accountability and profile' have been variously stated as changes in the area, the EOCV response by Corrs Chambers Westgarth (*Mr Gostencnik – acting on behalf of the DHS and Ms Callister*) highlights that this has been occurring in the past 2 to 3 years, whereas in evidence it was submitted that these changes occurred after Ms Robertson commenced maternity leave, and more particularly after the Ministerial Statement of June 3 2003.

78. Ms Callister has maintained that she, not Ms Robertson, organized a review meeting for April 1, 2004 and that she did not organise for a management review on Ms Robertson's return to work on March 29, 2004 because she had been advised by Mr Clements that "The main reason was just the pressure of time and the diary commitments of both of us. I had sought early on to try and get a time in the first day but Mr Clements had told me before Ms Robertson actually returned that he had the first two days pretty fully mapped out for her, meeting with people and getting across all the developments and changes." (PN 3016). Yet, Mr Clements states in evidence in

answer to the question “did you organise an intensive series of return to work meetings for her before she returned? --- An intensive series, I don’t recall that, no.” (PN 3694) and when pressed further whether Mr Clements had any conversation with Ms Callister regarding Ms Robertson’s availability to meet with Ms Callister, Mr Clements replied, “I don’t recall a conversation but - - -”.

79. It appears that Ms Callister had no intention meeting with Ms Robertson on her return to work from maternity leave. Ms McKinnon failed to fulfill her promises to Ms Robertson during this process: Ms McKinnon admits in her witness statement that “I did tell Ms Robertson that I would compare the two Position Descriptions and get back to her, but I did not do this due to other pressing work commitments” (para 6). Ms McKinnon prioritized Ms Robertson’s concerns after having:

- (i) told Ms Robertson that “If you have any further queries please do not hesitate to contact your Human Resources contact or me” (January 16 letter)
- (ii) been emailed by Ms Robertson on January 24 concerning the newspaper advertisements for Ms Robertson’s position and being informed about Ms Robertson’s distress.
- (iii) emailed Ms Robertson as follow up to Ms Robertson’s email expressing concern at the newspaper advertisements, closing with “If you wish to discuss this further please do not hesitate to contact me”
- (iv) been asked by Ms Robertson the status of Ms Robertson’s request for a comparison of the two position descriptions (February 11 email)

80. She did not respond even after Ms Robertson had submitted an internal grievance (February 6, 2004) for which Ms McKinnon was responsible (Ms Callister’s evidence at PN 2965 – “I was advised but I wasn’t actually there so it would have been Mary McKinnon”).

81. On Ms. Robertson’s return to work Ms Callister actively participated in the transfer of Mr Clements away from the program area that had incurred significantly increased complexity, responsibility, significance, sensitivity, accountability and profile. Ms Callister had allocated time to make arrangements for and with Mr Clements, but could not meet with Ms Robertson on her return to work..

82. Counsel for the respondent repeatedly questioned Ms Robertson regarding her lack of opposition to the transfer of Mr Clements to a safe house on the second day of Ms Robertson’s return from 12 months maternity leave. As counsel for the respondent persists through PN 2356 – 2386 that Ms Robertson did not express any opposition to the transfer of Mr Clements. Ms Callister, in her contribution to the sequence of emails at Exhibit 15 states “will discuss with you later”. As Ms Robertson answered repeatedly at PN 2362, PN 2371, PN 2374, PN2375, PN 2376, PN 2378, PN 2383, PN 2387, she fully expected that Ms Callister would act in accordance with her statement in that email sequence. She did not.

83. Ms Robertson gave evidence of the confused messages she was receiving in relation to the changes to her position. One example may be seen in Ms Haywood’s witness statement, paragraph 19 includes on line 3 “and was not subject to an over-grade review.” This contradicts the actual letter at KAH-5 in paragraph 4 where it says, “Although the over-grade process has been slightly amended due to the AIRC decision, the objectives remain consistent with the details provided to DHS staff at information and briefing sessions. There is still a need for you to have a discussion

with your manager to ensure that your work value is aligned grade and value range descriptors. As a result of this discussion you may identify a need for your job to be grown or for you to undertake development in that role. This discussion should take place by the end of February in 2004.”

THE PROCESS THAT OCCURRED IN RELATION TO THE CREATION OF THE EO 3 POSITION

84. *Although Mr Hall claimed in his evidence that his actions in creating the EO 3 position were prompted by an opportunity he saw arising in the future this is not supported by DHS's own documents regarding this issue. Although a surplus position was eventually used, Mr Hall's initial actions in relation to this situation were, in accordance with the process, to seek the approval of the secretary to appoint an EO 3 to manage this area of work. This was independent of the issue of where the position was eventually sourced. The issue of source was secondary to gaining the Secretary's approval that a position warrants an EO classification. It was only when advice was provided to the Secretary that the position did in fact warrant this classification but did not meet the criteria for an additional position as it was managing work already undertaken by the VPS 5 (Ms Robertson) that the use of an existing position was raised. (Refer Exhibit 1 of CPS3) a DHS's own documents are clear in this regard and in fact that chain of events outlined above is the only logical way that this process could operate.*

85. *Mr Hall's claim that "what we did was go to the Secretary on the basis that there would be capacity within the current envelope that we had"(PN 3561) contradicts all of DHS's documents provided under FOI.*

86. *Of very serious concern is Mr Hall's advice to the Secretary that this action was necessary as "recent recruitment action has failed to identify a suitable candidate to undertake this role at its current level VPS 5 ".(Attachment 7 CPSU 2) There is no question that anyone reading this statement would conclude that the position was vacant. Although under cross examination Mr Hall claimed that he was actually referring to recruitment action to VPS 5 positions generally, this explanation does not in any way assist in clarifying Mr Hall's written statement as the position Mr Hall was referring to was not in fact vacant and was occupied by Ms Robertson even though she was on maternity leave.*

87. *The Project Brief regarding this recruitment action (Exhibit 11 of CPSU 2) maintains this line stating –"The department is seeking to fill two positions simultaneously in the Child Protection and Juvenile Justice Branch of the Community Care Division- the Manager child Protection and the Manager Placement and Support. Both positions report to the Director, Child Protection and Juvenile Justice; are currently vacant and have proven difficult to fill in the past." (emphasis added).*

88. *This document also confirms DHS intent to appoint to the position in the week beginning 15 March 2004, so therefore prior to Ms Robertson's returning from maternity leave on 29//3/04.*

The CPSU therefore respectfully submits this course of action to the Commission should it agree with our submission:

1. *Make a finding that the WRA provisions in relation to maternity leave applied at the material times.*
2. *Reappoint Ms Robertson to the position she held prior to going on maternity leave*
3. *Any other order that the Commission sees fit.*

2. A) *The position nearest in status and remuneration is the EO 3 position occupied by Mr Clements.*

89. *Ms Robertson wants her former position back. However, should the Commission find that the position Ms Robertson held prior to taking maternity leave no longer exists then the “employer must employ her in whichever of those positions is nearest in status and remuneration to the position referred to in sub-clause(2).” (Schedule 14, cl. 12 (3)).*

90. *“Remuneration” would seem straight forward – it means salary and wages including any allowances or even regular extra payments such as consistent overtime.*

90. *“Status” is much more complex. The Collins Australian Dictionary defines status as “1) a social or professional position, condition, or standing to which varying degrees of responsibility, privilege, and esteem are attached.” (2003 p 1579). The CPSU submits that status includes number of reports, seniority of manager, client/stakeholder contact, access to committees, budget responsibilities and importance of work to the organisation.*

91. *In Rispoli v Merck Sharpe & Dohme & Ors [2003] FMCA 160 it was found that maintenance of remuneration is insufficient, that reporting lines are important indicators of status and that improving a returning employees ‘position over time will not excuse an employer from their legislated obligations.*

92. *“Status” is much more complex. The Collins Australian Dictionary defines status as 1) a social or professional position, condition, or standing to which varying degrees of responsibility, privilege, and esteem are attached.” (2003 p 1579). The CPSU submitted during the examination in chief of Ms Robertson the following as relevant factors:*

1. *Classification*
2. *Who you report to*
3. *How many line reports go to you.*
4. *Budgetary responsibilities. In relation not to 'delegation' but in relation to the size and public profile of the budgetary program you have oversight of*
5. *Complexity and challenge of work*
6. *Specific to this context: policy verses program delivery.*

95. *The issues have been considered judicially and within industrial commission jurisdictions but the CPSU submits that other cases considered in Anti-Discrimination Tribunals may be persuasive to the Commission. In Thompson v Orica Australia Pty Ltd [2002] FCA 939 considered the word 'comparable' under the Sex Discrimination Act 1992. Clearly this is not the same as “nearest to status and remuneration” hence why we submit that these cases are persuasive rather than binding. Thompson considered the nature of the job being 'more challenging and responsible' in relation to comparing a pre-maternity leave position to the position post maternity leave (at paragraph 44).*

96. *Two recent cases support this. In Thomson v Orica Australia Pty. Ltd. [2002] FCA 939 (30 July 2002) it was found that returning an employee to a position with the same job grade and title was insufficient and that employers must also consider the value of the position to the business, the complexity and responsibility of the position, level of revenue generated by customers/clients in that area.*

97. *In Rispoli v Merck Sharpe & Dohme & Ors [2003] FMCA 160 in the Federal Magistrates Court, Driver FM considered who the employee reports to as a relevant factor (paragraph 78).*

98. *As stated above, in the Illawara Council Case. His Honour in considering the issue of status made the statement:*

The offered position might be higher, equal or lower in status and salary or wages when compared with her former position. (at 20).

99. *The CPSU submits that the closest position is the EO3 position. This is because it is the closest in duties and status if judicial comment on status in both of the above cases is accepted - and considered to include the number of reports, client/stakeholder contact, access to committees, budget responsibilities and importance of work to the organisation.*

100. *That Ms. Robertson is also capable of this role is not questioned by her former managers (see Ms Callister at PN 3081).*

What of the consequence of this approach to Mr Clements?

101. *At (PN2273) the Commissioner asked about the consequence to Mr Clements. While the effect of a decision to other employees is a material consideration the redress of a wrong under s. 170LW is the primary concern. Mr Clements would have to be handled by the DHS in accordance with his Contract of Employment that was not submitted in evidence and the CPSU can make no comment to it.*

102. *The CPSU therefore respectfully submits this course of action to the Commission should it agree with our submission:*

1. *Make a finding that the DHS has breached the obligations under the VPS Agreements and the Workplace Relations Act 1996*
2. *Direct the DHS to appoint Ms Robertson to the EO3 position being the position in nearest in status and remuneration .*
3. *Any other order that the Commission sees fit.*

2. B) *In the Alternative to 2. A), the positions offered to Ms Robertson are not nearest in status and remuneration than the position she held prior to maternity leave.*

103. *Using the indicators of status above the CPSU submits that none of the positions offered to Ms Robertson are adequate to fulfill the obligations under the Workplace Relations Act 1996. The CPSU position is as outlined in the evidence in chief of Ms Robertson. It is the CPSU's submission that the Department's evidence did not refute the positions taken by Ms Robertson in relation to the status of the offered positions especially in relation to Program Budget size and number of staff reports. Many of the positions did not have the same status of line management report (upwards).*

103. Ms Callister gave evidence that the position, which Ms Robertson was offered when she was removed from the role of Manager of this area, has not been filled 18 months later. Mr Hall later gave evidence that it had not even been advertised. The CPSU submits that the usual situation in the public service is that opportunities to act in higher duties assignments are usually enthusiastically pursued and therefore advertised.

Position	Status of position	When was position offered	Comment
<i>Manager Quality Improvement</i>	<i>VPS 6.1 position reporting to the position of Manager Out of Home Care and Specialist Support which was the position previously held by Ms. Lower in organisational structure than previous position which reported to the director. 2 staff reports compared to 20 staff reports of previous position</i>	<i>This position was offered to Ms. Robertson in 8 June after Ms Robertson was advised that she had not been appointed to the position of Manager, Out of Home Care and Specialist Support</i>	<i>This position has never been advertised. It has never been filled.</i>
<i>Project Position-reviewing child death reviews</i>	<i>This position is a 6.1 position and reports to a 6.1 position. It has no direct reports.</i>	<i>This position was offered to Ms Robertson by Mr Hall in a meeting she had with him on 10 June to discuss her future and after he had advised her that "she may wish to pick up her career elsewhere".</i>	<i>This position has not been advertised and it is not an ongoing position.</i>
<i>Manager Secure Welfare</i>	<i>This position is a 6.1 position. It is an operational position and reports to a position at the same level as Ms Robertson. This position manages a staff group of approximately 30 staff</i>	<i>This position was offered to Ms Robertson by Mr Hall in approximately July 2004 even though the incumbent was on leave without pay and was not due to return to work until December 2004</i>	<i>According to Mr Hall this position has or is about to be advertised.</i>
<i>Manager Community and Professional Education</i>	<i>This position is a 6.1 position which reports to the Manager Child Protection who is on</i>	<i>This position was offered to Ms Robertson in August 2004</i>	<i>This position has not been advertised and no one has acted in it.</i>

		<i>the same level in the organisational structure as Ms Robertson's previous position This position had two direct reports</i>		
<i>Manager Monitoring and Review- Justice</i>	<i>Quality and Juvenile</i>	<i>This is a 6.1 position and at the time that it was offered to Ms Robertson it reports to a position at the same level in the organisational structure as Ms Robertson's former position. This position did not appear to have any direct reports or budget responsibility</i>	<i>This position was offered to Ms Robertson after she met with Ms Callister and Mr Hall and was pressured into moving into another Division in the organisation – housing or mental health .</i>	<i>This position does not appear to currently exist.</i>
<i>Manager Early years Care</i>	<i>Continuity of</i>	<i>This position reports to a manager who in turn reports to a director whereas Ms Robertson's previous position reported to a Director. It is a project position and does not appear to have direct reports nor any budget management</i>	<i>See above</i>	<i>This position appears to no longer exist.</i>
<i>Principal Advisor</i>	<i>Policy</i>	<i>This position does not appear to have any direct reports, budget management responsibility and it is unclear to whom it reports.</i>	<i>This position description was provided to Ms Robertson at the conciliation hearing in relation to this dispute in May</i>	<i>Mr Hall gave evidence that he thinks this position has been advertised since May but is currently unfilled</i>
<i>Manager Support Unit</i>	<i>Youth Services</i>	<i>This position reports to the Director Juvenile Justice and Youth Services Branch and has two reports.</i>	<i>See above Also, Discussion about this position commenced but DHS were unwilling to negotiate any changes in relation to the number of direct reports or budget responsibility despite their claims that they were willing to</i>	<i>This position has been filled</i>

		<i>negotiate with Ms Robertson in relation to a suitable position.</i>	
<i>Manager Family Services</i>	<i>This position reports to a 6.1 which is the same position as Ms Robertson's, it has no direct reports and no budget responsibility.</i>	<i>This position description was provided to Ms Robertson at the conciliation hearing in relation to this dispute</i>	<i>This position has been filled</i>
<i>Manager Service Improvement Team</i>	<i>This position was never offered to Ms Robertson</i>	<i>This position was never offered to Ms Robertson</i>	<i>This position has been filled</i>
<i>Project Manager, Unifying Quality Framework</i>	<i>This position reports to the Director, Statewide Outcomes Branch. Mr Hall gave evidence that this position has one direct report although earlier told the CSPSU that it was a sole position with no direct reports</i>	<i>This position description was provided to Ms Robertson at the conciliation hearing in relation to this dispute</i>	<i>This position has never been advertised.</i>

The CPSU therefore respectfully submits this course of action to the Commission should it agree with our submission:

- 1. Make a finding that the DHS has breached the obligations under the VPS Agreements and the Workplace Relations Act 1996 in failing to offer a position nearest in status and remuneration to the position previously held by Ms Robertson before she commenced maternity leave.*
- 2. Direct the DHS to provide a position equal in status and remuneration.*
- 3. In the event that Ms Robertson believes that any subsequent position offered is still not equal in status and remuneration the Commission will assist the parties in finding a resolution by conciliation and if need be by arbitration.*
- 4. Any other order that the Commission sees fit.*

Hierarchy of instruments

104. Some evidence from Janice Robertson and from DHS witnesses alluded to various Departmental and Governmental policy. Copies of such policy were included in various witness statements. It is important to recall the appropriate hierarchy of instruments in any consideration of conflict between them.

105. The Workplace Relations Act 1996 will invalidate any State Government law to the extent of inconsistency by virtue of s. 109 of the Australian Constitution:

s. 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

106. This would naturally apply to any State Government policy that does not have the status of a law or regulation. In the event that there is conflict between the Workplace Relations Act, Schedule 14 and a relevant State Government law or policy then it should be read as being invalid to the extent of the inconsistency.

Answers to the Department's Submissions

107. During the hearing of this matter, the Department outlined their submission at PN 2885 of the transcript. The principle argument is that the Department had discharged its duties under the WRA and the VPS Agreement as the placement of Mr. Clements into the E0 3 position occurred after Ms. Robertson had returned from maternity leave.

108. In response to this, the CPSU submits that reliance on this submission leads to the conclusions in 1 B) of our submissions – that of the Department attempting to avoid its obligations under the WRA. In cross examination Mr. Hall and Ms Haywood noted that they had acted mindful of the maternity leave provisions of the WRA at all times during Ms. Robertson's maternity leave. To take Ms Robertson through a process (albeit a flawed one in our submission) and then to rely on the either deliberate or accidental extension of time before the decisions were made is at best a bad faith approach to the employment relationship and the obligations under the WRA or at worst something more untoward."

[49] The CPSU filed the following answers to questions from the Commission (Exhibit CPSU-6):

“What was Ms Robertson's actual position title at the time she began maternity leave on 29 March 2003 - was it Manager Service Development or was it Manager OHCSSS?”

It was Manager Service Development. The title Manager out of home care was used from when Mr Clements commenced acting in the temporary position before interviews were held.

2. *If the position Ms Robertson actually held on 29 March 2003 was Manager Service Development what was the position description for that position?*

DHS do not have a copy. The document was sought under FOI.

Ms Robertson recalls that she used the Position Description for Manager, Service Improvement and amended it slightly, including changing the title, to develop the new position description for Manager Out of Home Care. She refers to the fact that the PD for Manager OHC&SS has a typographical error in it referring to the Division as Youth and Family Services which it was when she was appointed to Manager Service Development.

3. *What was Ms Robertson's actual rate of remuneration immediately before she began maternity leave on 29 March 2003?*

\$80,869.00 per annum.

4. When did her position title change to Manager OHCSSS?

The position Manager, Out Of Home Care and Specialist Support Service was advertised in VPS in February 2003 to find a replacement for Ms Robertson during the maternity leave. Organisation charts dated May 2003 refer to the position as Manager Out of Home Care and Specialist Support.

5. When did her VPS classification change from VPS5 to VPS6?

The position of Manager Out of Home Care and Specialist Support was re-classified from a VPS-5 level position to a VPS-6 level position as a consequence of the Department's implementation of the new Victorian Public Service classification structure. The translation took effect in relation to Ms Robertson's position on 1 November 2003

6. Did the rate of remuneration change - if so when?

Only in accordance with pay increases across the public service.

7. What was Ms Robertson's term or tenure in the position she held at 29 March 2003?

Ongoing/Full time

8. Did this tenure/term change from July 2003?

No."

The DHS Submissions

[50] The DHS filed the following written submissions (Exhibit DHS-1):

"INTRODUCTION

1. In its Outline of Submissions filed on 8 October 2004 the CPSU alleges that:

- DHS failed to properly advise Ms Robertson about the decision to create a new Executive Officer (EO) in the Community Care Division to manage the Out of Home Care and Specialist Support functions in the Child Protection Program;*
- Ms Robertson's VPS-5 position and the new EO position are identical. Alternatively, the CPSU appears to have alleged that the EO position is simply the position Ms Robertson agreed to prior to commencing maternity leave;*
- Ms Robertson should not, therefore have to apply for her own position;*
- DHS failed to take steps to arrange interview times that Ms Robertson could attend. Further, Ms Robertson was pressured into attending interviews at times that were unreasonable (at 6:00pm at night);*

- *the decision to appoint Mr Clements prior to the mailer being heard by the Australian Industrial Relations Commission (Commission) was a deliberate and calculated move by DHS designed to prejudice Ms Robertson's ability to gain justice;*
- *Mr Hall failed to advise Ms Robertson of her appeal rights in relation to her non-selection for the EO role;*
- *the roles DHS has subsequently offered to Ms Robertson are not comparable with her former VPS-5 role. Further, the positions offered to Ms Robertson by DHS were not "real" positions — they were not advertised, no other applicants were considered for them and they did not appear on any organisational chart;*
- *Ms Callister failed to encourage Ms Robertson to apply for the new EO role;*
- *Ms Callister has a history of restructuring senior departmental women out of positions while on maternity leave;*
- *Ms Callister failed to make any attempt to meet with Ms Robertson when she returned to work from maternity leave;*
- *DHS failed to consult in accordance with the relevant certified agreement; and*
- *Ms Robertson has a legislated right to return to her old position.*

JURISDICTIONAL ISSUES

2. *DHS raises several jurisdictional objections which are set out below. DHS submits that these objections should be dealt with as a preliminary point.*

3. *By notice of dispute (Notice) dated 24 August 2004, the CPSU purported to refer a grievance or dispute to the Commission pursuant to "clause 12 - Disputes and Grievances of the Victorian Public Service Agreement 2004".*

The CPSU rely upon section 1 70LW of the Workplace Relations Act 1996 (Act) together with clause 12 of the Victorian Public Service Agreement 2004 (2004 Agreement) in order to confer jurisdiction on the Commission to deal with the mailers contained in the Notice.

4. *Clause 12.1 of the 2004 Agreement relevantly provides:*

"12.1.3 If the matter still remains unresolved it may be referred to the relevant internal review process in the relevant Agency. Where the internal review process is unable to resolve the dispute or grievance, it may be referred by either Party to the Commission for resolution by concilia Non and, if necessary, arbitration. Any arbitration includes access to appeal rights, to be applied in accordance with the Workplace Relations Act 1996 and its Rules and Regulations."

5. *Section 1 70LW of the Act relevantly provides:*

"Procedures in a certified agreement for preventing and settling disputes between the employer and employees whose employment will be subject to the agreement

may, if the Commission so approves, empower the Commission to do either or both of the following:

a) to settle disputes over the application of the agreement,...

6. Clause 12 of the 2004 Agreement is a provision of a kind contemplated by section 170LW of the Act.

7. Subject to the satisfaction of a condition precedent (discussed below), the Commission is empowered by clause 12.1.3 of the 2004 Agreement to resolve a dispute by conciliation and, if necessary, by arbitration. The Commission, in exercising its functions under clause 12 is exercising powers of private conciliation and arbitration. The power of private arbitration is subject to the limitations imposed on the exercise of that power both by section 170LW of the Act and clause 12 itself: *CFMEU v Australian Industrial Relations Commission* (2001) 203 CLR 645.

Is this a dispute over the application of the agreement?

Subject matter of the dispute

8. The “dispute” referred by the CPSU to the Commission is described by the CPSU as follows:

“the alleged breach by the employer to genuinely and reasonably apply Clause 48 - Parental Leave, of the Victorian Public Service Agreement 2004 and also Schedule 14 of the Workplace Relations Act 1996 as referred to in Clause 48.1 of the said Agreement”.

9. No other dispute has been referred to the Commission. We note however, that according to the Outline of Submissions filed by the CPSU, it is also now alleged that DHS failed to consult as required by clause 15 of the Victorian Public Service (Non-Executive Staff) Certified Agreement 2001 (2001 Agreement).

10. The second allegation referred to above is not a matter about which a referral by the CPSU has been made to the Commission pursuant to clause 12 of the 2004 Agreement. Nor is it a matter which has been referred to the Commission by the CPSU under clause 16 of the 2001 Agreement. Unless and until a proper referral of that matter is made, the Commission does not have jurisdiction to deal with it. For the reasons set out below, a proper referral cannot be made.

11. Further, many of the issues sought to be agitated in the Outline of the CPSU Submissions and summarised in the introduction to these submissions, do not on their face raise a matter which is about the application of the 2004 or 2001 Agreement. The relevance of these matters to the subject matter of the referral of dispute is not readily apparent.

The dispute is not about the application of the 2004 Agreement

12. The Commission does not have jurisdiction to deal with either of the matters sought to be agitated by the CPSU because neither matter gives rise to a dispute over the application of the 2004 Agreement. This is because the matters in dispute are properly characterised as disputes over the application of the 2001 Agreement.

13. *The 2004 Agreement was certified and came into operation on 2 June 2004. By clause 7.1 of the 2004 Agreement, that agreement operates so as to replace all previous certified agreements. Consequently, the 2001 Agreement ceased to operate on the certification of the 2004 Agreement: section 170LX(2)*

14. *Once the 2001 Agreement ceased to operate, the Commission's jurisdiction to resolve disputes over the application of the 2001 Agreement cannot be invoked, because clause 16 of the 2001 Agreement is no longer in operation. The CPSU sought to invoke the Commission's jurisdiction on or about 24 August 2004. At that time, the 2001 Agreement was not in operation. This does not mean that the CPSU or Ms Robertson cannot pursue claims of the alleged breach of any rights or obligations arising under the 2001 Agreement:*

section 178. It does mean however, that the CPSU cannot agitate those matters before the Commission by relying on section 170LW of the Act and clause 16 of the 2001 Agreement.

15. *Rights and obligations arising under the 2004 Agreement did not commence until that agreement was certified. No right or obligation arising under the 2004 Agreement touches upon the facts and circumstances surrounding the matters sought to be agitated by the CPSU. Ms Robertson returned to work from parental leave on 29 March 2004 and clause 48 (parental leave) of the 2004 Agreement did not impose rights and obligations on the parties at that time.*

16. *Likewise any obligation to consult arising under clause 10 of the 2004 Agreement did not operate upon the rights and obligations of the parties in relation to the alleged organisational restructure resulting in the creation of the E03 position. The obligation to consult, if such obligation existed, only existed under clause 15 of the 2001 Agreement in relation to action taken by DHS between November 2003 and April 2004.*

Does clause 7.1 of the 2004 Agreement preserve a right to bring a matter arising under the 2001 Agreement to the Commission?

17. *Clause 7.1 of the 2004 Agreement relevantly provides that "any entitlement in the nature of an accrued entitlement to an individual benefit which has accrued under any such previous certified agreement or Australian Workplace Agreement will not be affected by the making of this Agreement."*

18. *The preservation of entitlements in clause 7.1 does not have the effect of preserving the right to bring disputes over the application of the 2001 Agreement to the Commission under clause 12 of the 2004 Agreement. This is so because:*

(a) An individual employee may not themselves refer a dispute or grievance to the Commission under clause 12 of the 2004 Agreement. The right is exercisable by a "Party". Party is defined in clause 3.9 as "the State of Victoria or the CPSU". Clauses 16.1(c) and 3.8 of the 2001 Agreement are to the same effect. Thus such rights as existed under the 2001 Agreement to bring matters to the Commission were exercisable only by the State of Victoria and the CPSU. The preservation in clause 7.1 does not operate upon the rights of the State of Victoria or the CPSU, rather it is limited to preserving "any entitlement in the nature of an accrued entitlement to an individual's benefit".

(b) Even if the preservation in clause 7.1 operated to preserve a right of the CPSU, the right to bring a dispute under the 2004 Agreement (or the 2001 Agreement) in respect of the application of the 2001 Agreement is not one which is in the nature of an accrued entitlement to an individual's benefit.

*(c) Even if the right to bring a dispute can be described as one which is in the nature of an "accrued" entitlement to an individual's benefit, in this case no such right accrued to the CPSU because there has not been a referral of the matters in dispute to an internal review process as required by clause 16.1(c) of the 2001 Agreement. The same is true if the "right" or "entitlement" is characterised by reference to the "right" of Ms Robertson to return to a particular position after a period of parental leave. The right to have that issue dealt with did not accrue to the CPSU or Ms Robertson because the condition precedent in clause 16.1(c) of the 2001 Agreement was not satisfied: c/f *Edwards v Australian Taxation Office (PR938531)*. It follows that on the date on which the 2004 Agreement was certified, no relevant right had accrued to the CPSU or Ms Robertson which could be said to have been preserved.*

(d) The preservation of entitlements in clause 7.1 must be read in the context in which it appears. Since clause 7.2 expressly preserves part of the operation of the 2001 Agreement (a power of arbitration by the Commission) in respect of translation to a new classification structure, it must follow that clause 7.1 is not intended to preserve other provisions which confer jurisdiction on the Commission to deal with matters arising under the 2001 Agreement upon the commencement of the 2004 Agreement. It is also clear from the juxtaposition of clauses 7.1 and 7.2 that a right to invoke the jurisdiction of the Commission under the 2001 Agreement is different in nature to "an accrued entitlement to an individual's benefit".

Is the condition precedent under clause 12 of the 2004 Agreement satisfied in order to confer jurisdiction?

19. Clause 12.1.3 of the 2004 Agreement requires a condition precedent to be satisfied before a dispute or grievance may be referred by either party to the Commission. The pre-condition is that an internal review process has been unable to resolve the dispute or grievance. In order for that condition precedent to be satisfied, there must first be a referral of the dispute or grievance to an internal review. If the precondition under clause 12.1.3 has not been satisfied, the Commission does not have jurisdiction to deal with a dispute or grievance over the application of the 2004 Agreement under clause 12. The same position pertained under the 2001 Agreement.

20. It is now well established that the jurisdiction of the Commission created by section 170LW of the Act is a power:

- of private arbitration to settle disputes over the application of a certified agreement;*
- authorised by the parties through an exercise under the terms of the certified agreement;*
- whose scope is to be discerned from the terms of the agreement itself;*
- where relevant, to maintain the settlement of the dispute as represented by the certified agreement; and*
- where authorised by the agreement may involve decisions as to the legal rights and liabilities of the parties to the agreement provided that such concerned disputes about the application of the agreement: *CFMEU v**

AIRC; Maritime Union of Australia v Australian Plant Services Pty Ltd (PR908236); Media Entertainment and Arts Alliance v Australian Broadcasting Corporation (AIRC Full Bench Print M3462).

21. *The subject matter of the dispute before the Commission concerns an alleged breach of the parental leave provisions of the 2004 Agreement and the consultation provisions in the 2004 Agreement. Properly characterised the dispute is actually over the application of the corresponding provisions in the 2001 Agreement. Neither Ms Robertson nor the CPSU have referred the subject matter of those disputes to the internal procedure available at DHS. The review mechanism available under the internal procedure of the DHS is wide ranging and sufficiently broad to encompass the subject matters which the CPSU now request that the Commission to determine.*

22. *Although two grievances were lodged by Ms Robertson neither of those grievances concerned the subject matter of this dispute. The first grievance related to the probity of the creation of the position and the manner in which recruitment for it was commenced. The first grievance was not proceeded with because Ms Robertson lodged a complaint with the Equal Opportunity Commission of Victoria (EOCV). The second grievance related to a dispute about Ms Robertson's failure to be appointed to the EO position on the ground that members of the interview panel were biased. This second matter could not on any account be the subject of a referral to the Commission under clause 12 of the 2004 Agreement or clause 16 of the 2001 Agreement since it does not concern the application of the agreements. Rather it concerns Ms Robertson's failure to be appointed to an EO position, which position is not subject to regulation under either of the 2004 or 2001 Agreements.*

23 *Clause 12.1.3 of the 2004 Agreement clearly limits the manner in which the Commission can exercise its jurisdiction. Such a limitation on power is permissible in a certified agreement. Since the review mechanism has not been utilised to resolve the dispute or grievance which is the subject of the present notification, the Commission does not have jurisdiction to deal with the matters that the CPSU now ask it to deal with.*

24 *For the reasons above stated, the present applications should be dismissed for want of jurisdiction.*

WHY WAS THE EO POSITION CREATED?

Community Care Division

25 *The Community Care Division of DHS is responsible for the policy and program framework for services for Victorian children, young people, families and vulnerable individuals. In addition, the Division has responsibility for the development and co-ordination of the delivery of State Concessions and Relief Grants to eligible households and individuals, and community care obligations for trustee services.*

26 *The Community Care Division consists of three branches through which it provides a range of six direct service functions and 21 programmatic functions.*

27 *The Child Protection and Juvenile Justice Branch is responsible for the delivery of DHS' key statutory services. That is, it is responsible for legislation, policy and program development, planning, resource distribution, monitoring and review of the*

adoption and permanent care program, child protection, juvenile justice and placements and support programs.

28 *The Child Protection and Juvenile Justice Branch is structured into three major units and two smaller specialist units. The three major program units are:*

- *Child Protection;*
- *Juvenile Justice; and*
- *Placement and Support.*

Changes to the responsibilities of the Out of Home Care and Specialist Support Unit

29 *The Placement and Specialist Support Unit carries responsibility for the framework, services development and performance monitoring for a range for internal and external programs supporting vulnerable children and adolescents, the majority of whom are statutory clients of DHS. In the past 3 years the significance, sensitivity and public profile of this program area has markedly increased. For example, there have been:*

- *audits of children in out of home care; • issues around chroming amongst children in out of home care;*
- *the 2003 Public Parenting Review;*
- *the 2003 Out of Home Care Partnership Review;*
- *issues surrounding the screening of internal and external staff caring for children in out of home care;*
- *ongoing disputation about the level of funding/reimbursement for key activities such as foster care; and*
- *initiation of a multi-year program for replacement/refurbishment of residential facilities.*

30. *Further, in mid 2003, the Minister for Community Services made a statement to the Parliament outlining her commitment to implementing recommendations that arose out of key policy documents (such as the Public Parenting and Pathways to Partnership — June 2003). The implementation of these recommendations has led to significant reform in the Out of Home Care Area including:*

- *Quality Framework — to adopt a more robust and systematic approach to quality management and service delivery. Specific mention is made about the adoption of a mandatory Quality Assurance Strategy for Funded Community Service Organisations;*
- *Regional Partnership Planning to be implemented across internal and external stakeholders at a regional level to enhance service planning and delivery;*
- *Recruitment of Foster Carers — the development of a more professional Foster Care Service, and a more integrated and targeted approach to recruitment;*
- *Development of an agreement funding model — to develop a funding model across substituted care services, which is transparent and flexible;*
- *Ministerial Advisory Committee — the establishment of a Ministerial Advisory Committee (MAC) across the sector;*
- *The Placement and Support Sector Development Plan; and*
- *The Review of Out of Home Care by the Auditor General.*

31 As a result of these changes there has been a significant increase in the budget allocated to this area and an expansion of the policy/program responsibility.

32 Based on the extent of the intended reform agenda, the Executive Director determined that the current level of management within the Child Protection and Juvenile Justice Branch of the Community Care Division was insufficient to meet the new responsibilities that the implementation of the reform agenda would create and the associated increase in Government expectations and scrutiny. That is, although the individual Child Protection and Juvenile Justice Program Units were managed by Band 3 Executive Officers, the Out of Home Care and Specialist Support Unit was only managed by a (then) VPS-5 officer, Ms Robertson. As such, a decision was made to seek approval for the creation of a new EO position.

Approval for creation of the EO position

33 The number of EO positions within a Government department is set. Any change to the number of EO positions must be requested through the State Co-ordination and Management Committee and ultimately, must be approved by the Premier. A briefing on the need for a new EO position is required and is generally sent to the Secretary of the Department who then makes a formal request for the position through the State Co-ordination and Management Committee. New EO positions can either be created by reusing an EO position within the allocated numbers in a department or by seeking an increase in the department's executive numbers for a specific purpose.

34 DHS has a prescribed number of EO positions. At the time of the submission for the EO role, the prescribed number of positions was 119. At any point in time, the number of active EOs must not exceed the approved number of positions without the endorsement of the State Co-ordination and Management Committee and the approval of the Premier.

35 As a result of the activity outlined above, the Executive Director of Community Care forwarded a briefing to the Secretary of the Department in August 2003 seeking approval for the allocation of an additional Band 3 EO position within the Community Care Division. When such a request is made, the Secretary meets with the Executive Staff and Remuneration Committee (ESRC) to determine whether the request should be granted. The ESRC includes the Secretary, Executive Director Human Resources and Executive Director Operations.

36 Prior to consideration by the ESRC, the Human Resources Branch of DHS conducted a work value assessment of the proposed role. In this instance, the conclusion was that due to the breadth and responsibilities role, it was a Band 3 EO position. However, the report also concluded that the ESRC was unlikely to endorse the creation of a new executive position within DHS.

37 The decision was therefore made that if a new executive position was to be created it had to come from the existing (already approved) EO positions within DHS. It was subsequently determined that the creation of the EO position would wait until the amalgamation of the North/Western region was finalised and a spare EO position had been "freed up". This position could then be taken and allocated to the Community Care Division.

38 As envisaged, on or about 24 November 2003 the amalgamation of the Northern and Western regions was finalised and resulted in the saving of one EO position within the DHS approved ceiling. This position was then redirected to the proposed EO position within the Community Care Division. As such, while steps were first taken in August 2003 to have the creation of a new EO position approved, it was not until late November 2003 that approval was granted and the position actually created. Approval for the creation of the position was received during a particularly busy time of 2003 as Parliament was sitting until 4 December which created additional work pressures across the Division. In addition, the Manager Child Protection (also an EO position) indicated that he intended to step aside from his position. This meant that DHS had to recruit two EO positions. It was therefore decided that a recruitment process could not commence until the new year. As such Ms Robertson was advised about the creation of the EO position and the effect that it would have on her role as soon as the final arrangements were made in relation to the recruitment for the position. Ms Robertson was advised some days before a public announcement was made to the remainder of all DHS staff about the creation of the position.

IS THE NEW EO ROLE IDENTICAL TO MS ROBERTSON'S (OLD) VPS-6 ROLE?

Classification of the role

39. Ms Robertson has asserted that the EO role is "almost exactly the same" as the role that she filled prior to commencing parental leave. While a number of the tasks assigned to the new EO role are similar in scope to those previously undertaken by Ms Robertson in the VPS-6 position, the responsibilities of the new EO position have expanded greatly and take the role significantly beyond what is expected of an employee at a VPS-6 level.

40. Prior to 2003, jobs in the Victorian Public Service were in a broadband system and job evaluation was only occasionally undertaken using the Points Factor Evaluation System and narrative standards. Administrative staff were classified as VPS1 to VPS-5 from 1995 to November 2003 and jobs were position based. The Public Sector Management and Employment Act 1998 (Vic) replaced position based employment with people based employment. This means that employees are now engaged to a classification/level rather than a particular position, providing the possibility for employee re-assignment at level in response to changing business needs.

41. In late 2003, the Victorian Government and the CPSU agreed on a new career structure for the Victorian Public Service resulting in a new non-overlapping 6 Grade classification. Grades have an associated salary framework that provides the basis on which jobs of equivalent work value are paid.

42. One of the main principles of the new structure was that jobs must be designed transparently, using the Grade and Value range descriptors to ensure all employees receive similar pay for jobs of similar work complexity. Many jobs in DHS have similar or equivalent functions, regardless of their locations. The higher the range and variety of tasks and level of expertise required to complete the tasks, the higher the classification.

43. Grade descriptors provide an outline of the work environment and the capabilities that each grade is expected to display. For Grade 6, the expected capabilities include:

- *uses knowledge of structures, processes and culture of government, the sector and the department to develop policies and new project initiatives;*
- *high level expertise in the field or discipline;*
- *identifies a response to new and emerging strategic issues impacting on the operating environment;*
- *subject matter expert that conceptualises, initiates, implements, promotes and evaluates complex and innovative technical programs;*
- *participates in strategic planning and contributes to strategic decision making processes.*

44. *Some of the typical functions of a Grade 6 include responsibility for operational policy or service development impacting on a major functional area, management of an area with significant budget, staff responsibilities or strategic importance and/or management of a large scale organisational service or regional delivery function.*

45. *In comparison, the range of capabilities that a EO-3 is expected to display include the ability to:*

- *fully interpret and understand agency policies;*
- *identify and develop ideas and alternative courses of action within policy parameters;*
- *the ability to plan, develop, implement and monitor standards and service delivery models within a major state-wide program, ensuring that government and departmental policy objectives are met; • demonstrates an understanding of issues, expectations and pressures which impact on Government/DHS;*
- *clearly understands the policy making processes and drivers and links work outcomes to political outcomes;*
- *proposes actions which clearly acknowledges and articulates political limitations and opportunities;*
- *demonstrates awareness of broad departmental and state-wide strategic issues;*
- *considers possible future trends, opportunities and contingencies when developing objectives and action plans.*

Differences between the EO role and Ms Robertson's VPS-6 role

46. *The position description for Ms Robertson's former VPS-6 position required her to:*

- *support staff to reach their potential while maximising their contribution to achieving organisational goals;*
- *effectively manage the development, implementation and evaluation of policies;*
- *effectively manage the strategic development and design of programs, services and service standards so that service delivery is effective, efficient and client focused;*
- *effectively negotiate and liaise at senior level with all key stakeholders within the Division, DHS the service provider sector and more broadly as appropriate so that policy and service system development is consistent and reflects agreed priorities and best practice;*

- *prepare briefing papers and reports and provide authoritative advice and expertise to DHS and the Minister; provide leadership and direction to staff and manage effective workplace relationships.*

47. *In short, the Manager (Out of Home Care and Specialist Support) — VPS-6 was required to consolidate and strengthen Out of Home Care Services and Specialist Support Services to deliver a balanced and effective service to the target group. As Ms Robertson has acknowledged (given that she drafted her own position description), the primary purpose of the role was to focus on the development, redevelopment and review of these services.*

48. *In comparison, the successful applicant for the new EO role was required to:*

- *redevelop the continuum of specialist support services to effectively respond to the range of needs presented by clients of child protection;*
- *monitor expenditure for payments to Foster carers (significant budget increase to \$4 million);*
- *establish a Children’s Advocate for children in Out of Home Care and mentoring programs for children leaving care;*
- *liaise and work with the Children’s Advocate to establish a quality system for Out of Home Care Services;*
- *develop a model for therapeutic foster care;*
- *develop quality monitoring and assurance systems;*
- *provide expert advice to the Minister, Executive Director and Director, on all policy and programs matters relating to Placement and Support Services and represent Victoria on national forums as required; and*
- *provide advice to the Director on funding arrangements and resource allocation to meet the future directions of the program. 49 Further, it was proposed that the candidate appointed to the new EO role would be required to:*
- *exercise greater autonomy in identifying and implementing key policy priorities to ensure that the Minister’s Reform Agenda was implemented;*
- *direct engagement and liaison with the Minister’s Office, the Ministerial Advisory Committee and with the Office for Advocate for Children in Out of Home Care; and*
- *participate in the Divisional Executive Management Team — with the expectation of assuming a corporate leadership role.*

50. *In short, the successful applicant for the new EO role had responsibility for the policy frameworks, service development, and performance monitoring for a range of internally and externally delivered programs supporting vulnerable children and adolescents, the majority of whom are statutory clients of DHS. The successful applicant for the position was to be responsible for a budget of \$158.8M (Child Protection Specialist Services of \$27.3M and Placement and Support Services of \$131.5M).*

51. *Each of the responsibilities set out above are “new”, that is, they were not tasks that were undertaken by the Manager VPS-6 (Out of Home Care and Specialist Support).*

WHY DID MS ROBERTSON HAVE TO APPLY FOR THE POSITION?

52. *DHS is not able simply to appoint Ms Robertson to the EO-3 role. Government policy requires that all EO vacancies exceeding 6 months must be advertised as widely as is necessary to ensure a competitive field of applicants.*

53. *The Public Sector Employment standards issued by the Commissioner for Public Employment also requires that all vacancies for executive and on-going employment must be advertised.*

54. *As such, Ms Robertson could not simply be promoted into the new EO role and was instead required to go through an application process. We note that even if the EO position had simply been a reclassification of Ms Robertson's VPG-6 position, she would still have been required to apply for the role and go through a selection process in accordance with Government policy because the EO position included tasks and responsibilities that Ms Robertson had not previously undertaken.*

WAS MS ROBERTSON ADVISED ABOUT THE DECISION TO CREATE THE NEW EO ROLE?

55. *As discussed above, approval for the creation of the new position was not given until late November 2004. Final arrangements in relation to recruitment for the position were not made until early January 2004.*

56. *On or about 9 January 2004, Ms Callister telephoned Ms Robertson at home and advised her that the Secretary of the Department had accepted an application made by the Community Care Division that the role of Manager (Out of Home Care and Specialist Support) had grown to the extent that it justified the creation of a new executive level management position.*

57. *On 16 January 2004 a follow-up letter regarding the creation of the new position was sent to Ms Robertson. This letter made it clear that a new position of Executive Officer had been created to manage the Out of Home Care and Specialist Support functions in the Child Protection and Juvenile Justice Branch.*

WHAT ARRANGEMENTS DID DHS MAKE REGARDING INTERVIEW TIMES?

58. *KPMG and DHS both made considerable efforts to arrange interviews at times that would be convenient to Ms Robertson and that would best accommodate her child care arrangements. DHS did not arrange any interviews with Ms Robertson at 6:00pm in the evening. The interview panel initially offered a couple of times for the interviews on 22 March and 25 March at 5:30pm and also offered interview times on these dates in the morning. Ms Robertson advised that should be out of Melbourne during these times and would not be available for interview before her return to work from parental leave. A new time was set for 31 March at 2:00pm, in the first week of Ms Robertson's return to work. Ms Robertson declined to attend this interview as it was her first week back and she anticipated being very busy. A number of interview times were subsequently offered to Ms Robertson however, she declined to attend all bar one (one interview was cancelled by DHS when a panel member required urgent leave to attend a funeral overseas). The following interview times were offered to Ms Robertson:*

- *8 April at 3:00pm;*
- *21 April at 10:00am;*
- *28 April at 4:30pm;*
- *21 May at 1:00pm; and*

- 24 May at 2:00pm.

59. *All of these times were chosen with consideration for Ms Robertson's child care arrangements.*

WAS MS ROBERTSON ENCOURAGED TO APPLY FOR THE ROLE?

60. *Ms Callister denies that she failed to encourage Ms Robertson to apply for the new EO role. Ms Callister rang Ms Robertson on 9 January to both advise her of the new EO role, and to encourage her to apply.*

61. *During Ms Callister's telephone conversation with Ms Robertson on 9 January 2004, she encouraged Ms Robertson to apply for the position while she was on parental leave, indicating that with her experience and as the managerial incumbent she believed that Ms Robertson would be a very strong candidate. In numerous subsequent e-mails and letters Ms Callister continued to encourage Ms Robertson to apply for the role.*

62. *Ms Robertson was also encouraged to apply for the role by Ms Mary McKinnon who was Acting Director of Child Protection and Juvenile Justice while Ms Callister was on annual leave/study tour.*

63. *Ms Callister denies that she failed to make any attempt to meet with Ms Robertson when she returned to the workplace from parental leave. Ms Robertson returned to work on 29 March 2004. Ms Callister arranged a morning tea to welcome Ms Robertson back, and spoke with her during the morning tea. Ms Callister also made an appointment to meet more formally with Ms Robertson during her first week back at work. However, Ms Roberts only worked 3 out of 5 days in her first week and was then absent from the workplace on sick leave for 3½ weeks. The meeting between Ms Callister and Ms Robertson was subsequently cancelled due to Ms Robertson's absence.*

64. *During the period between Ms Robertson's return to work, and the completion of the selection process there were numerous emails and letters between Ms Callister and Ms Robertson. Ms Callister repeatedly offered Ms Robertson an opportunity to discuss her concerns. However, Ms Robertson invariably sought a reply in writing, rather than seeking an opportunity to meet*

65. *Ms Robertson's allegation that Ms Callister or DHS have a history of restructuring women out of the workforce is inaccurate and offensive. The matter Ms Robertson apparently refers to is outlined in detail in Ms Callister's witness statement filed in evidence in these proceedings.*

DECISION TO APPOINT DAVID CLEMENTS

66. *It was unreasonable for the CPSU and Ms Robertson to have expected DHS to further delay the appointment of the successful candidate to the EO role while the CPSU determined whether and when it would take the matter to the Commission.*

67. *The selection and appointment of a candidate for the role had already been delayed for many months while DHS attempted to ensure that Ms Robertson fully participated in the selection process. As outlined above, a number of interviews had been scheduled for Ms Robertson by DHS. Ms Robertson cancelled all but one of these*

interviews, primarily on the basis that she was determined to wait for the outcome of her complaint to the EOCV before she attended an interview.

68. When Ms Robertson's complaint was dismissed by the EOCV for lack of substance, she again sought to hold the selection process in abeyance while she considered whether to pursue her complaint to the VCAT. Having been made very aware of the consequences of failing to participate in the selection process (that is, that a decision would simply be made on the material already before the selection panel), Ms Robertson again sought to delay the matter being finalised by indicating that she was considering referring the matter to the Commission rather than simply doing so.

69 Given that the selection process had been scrutinised by two independent bodies (the EOCV and the Grievance officer), the need for stability in the program area (given the critical work requirements) and the need to balance fairness to the successful candidate as well as to Ms Robertson, DHS proceed to announce Mr Clements' appointment to the role. DHS deny that its actions prejudiced any rights that Ms Robertson may have.

FAILURE TO ADVISE ABOUT APPEAL RIGHTS

70. On 3 June 2004, Mr Alan Hall advised Ms Robertson by telephone that she was not the recommended applicant for the EO position. During this telephone conversation, Ms Robertson asked about the role that she would carry out in the future. Mr Hall advised Ms Robertson that he would prefer to sit down with her and have a discussion about what her future role might be. Ms Robertson indicated that she would prefer to be sent a formal position description and Mr Hall undertook to provide her with a position description for an on-going role in the following week. Ms Robertson also asked Mr Hall to confirm their conversation in writing.

71. On 4 June 2004 Mr Hall wrote to Ms Robertson confirming their telephone discussions on 3 June 2004. This letter was intended only to confirm Mr Hall's conversation with Ms Robertson of the previous evening. Mr Hall did not refer to any appeal rights that Ms Robertson may have in this letter. The generic Human Resources letters for unsuccessful applicants for Executive Officer positions also do not contain any reference to appeal rights. Conversely, the generic Human Resources letter sent to unsuccessful applicants for VPS positions does provide information on an individual's right to appeal a selection decision.

72. Accordingly, while it is correct that DHS did not specifically advise Ms Robertson about her right to appeal the outcome of a selection decision, Ms Robertson is an experienced and senior member of DHS. She is therefore familiar with DHS grievance process (as evidenced by the first grievance that she lodged in February 2004) and her rights under it.

LEGISLATED RIGHT TO RETURN TO FORMER POSITION

“Right” to return to former position

73. The CPSU has asserted that women who take maternity leave have a legislated right to return to the role they held prior to commencing leave through the legislative minimum standards contained in the Act and the VPS Agreement. Ms Robertson returned to the workplace on 29 March 2004. Given that the 2004 Agreement did not

come into operation until June 2004, Ms Robertson's rights and DHS' obligations in relation to her return to work are governed by and the 2001 Agreement.

74. Clause 43 of the 2001 Agreement provides that parental leave (which includes paid and unpaid maternity leave) will be provided in accordance with Schedule 14 of the Act. Clause 1(8) of schedule 14 of the Act provides that:

"an employee who takes parental leave, is in most circumstances, entitled to return to the position to which he or she held before the leave was taken."

75. Clause 12 of schedule 14 then proceeds to set out an employer's obligation towards an employee who seeks to return to work after a period of Schedule 14 leave. Clause 12(2)(c) of schedule 14 requires that an employer return an employee who returns to the workplace after an absence due to leave to the same position she held immediately prior to commencing maternity leave.

76. Clause 12(2)(c) operates subject to clause 12(3) which provides that:

"if that position no longer exists but she is qualified for, and can perform the duties of, other positions in the employer's employment the employer must employ her in whichever of these positions is nearest in status and remuneration to the position referred to in sub-clause (2)."

77. In this manner, the Act recognises that changes can occur within a workplace which affect the number of positions available, the duties and responsibilities of the available positions and the manner in which work is structured. As such while the Act compels an employer to "hold open" a job for an employee who is absent from the workplace on parental leave it does not require an employer to delay any restructure to its workplace until that employee returns from leave. As such, while Ms Robertson had a legislated right to return to DHS, she did not have a "legislated right" to return to precisely the same position she held prior to commencing parental leave if that position no longer existed.

78. In any event, when Ms Robertson returned from parental leave in March 2004 she returned to the same position that she held prior to commencing parental leave. That is, she returned to the position of Manager, Out of Home Care and Specialist Support. While DHS had made it abundantly clear that the duties and responsibilities of her role would fundamentally change in the near future when the EO position was filled, the EO position had not been filled and the envisaged changes had not therefore taken place at the date that Ms Robertson returned to the workplace. As such, she returned to the same position and duties that she was responsible for prior to commencing parental leave.

Did DHS remove duties from her

79. During Ms Robertson's absence from the workplace on parental leave, significant reforms affecting the Out of Home Care service system were identified, and a few were progressively implemented, under the control and supervision of the Director, Child Protection and Juvenile Justice and the Director, Research Budget and Program Support. This was in part the reason for identifying the need for an EO position to take on a more strategic and integrated approach to systems and policy development.

80. Responsibility for the new activities had not been part of Ms Robertson's role before she commenced parental leave and for that reason, were not assigned to her area when she returned to work.

81. *On Ms Robertson's return to the workplace, David Clements undertook a handover with Ms Robertson. Due to the establishment of the Office of the Advocate for Children in Care, and the need to provide the Advocate with senior support in establishing his role and the office, the Secretary DHS requested the then Acting Executive Director Community Care to provide a senior experienced person as a matter of priority. David Clements was transferred to the Office of the Advocate after consultation with Ms Robertson during which her opinion as to Mr Clements' suitability for the role was sought. As Ms Robertson had returned to her original role, and picked up all of the duties associated with her role prior to her absence, staffing for the Out of Home Care area was not compromised.*

82. *Further, it was made clear to Ms Robertson when she returned from parental leave that some of the strategic activities that had not been undertaken by Ms Robertson prior to her commencement of parental leave, would be managed elsewhere in the Division. For example:*

(a) Ms Robertson was advised that she would not be provided with the relevant papers for the MAC meetings because she was not a member of MAC. Work for MAC was managed out of the office of the Executive Director. Ms Robertson raised this issued with Mary McKinnon who agreed that she could attend the MAC meeting as an observer, however made it quite clear that Ms Robertson had no responsibility for MAC activities. Incidentally, the MAC meeting that Ms Robertson sought to attend was an extraordinary meeting that was related to consultation on the Policy and Legislation Review for Child Protection. It was not one of the regular scheduled MAC meeting dates.

(b) Responsibility for managing the Review into Out of Home Care by the Auditor General was assigned to Alan Hall due to the importance of the work, and the senior level of management required.

(c) The Industry Development Plan was assigned to Alan Hall as it related to his area of expertise.

(d) A Budget Initiatives Unit was developed post the restructure to manage all new budget initiatives across the Branch. Responsibility for and management of this unit was assigned to Michael Naughton who again has experience in this area.

Are the jobs Ms Robertson has been offered comparable?

83. *The CPSU has alleged that the roles offered to Ms Robertson are not "comparable" to the roles that she held prior to going on parental leave. The issue of "comparability" has generated much case law: Thomson and Orica Australia Pty Ltd [2002] FCA 939 (30 July 2002), Rispoli and Merck Sharpe and Dohme (Australia) Pty Ltd & Ors [2003] FMCA 160 (3 October 2003), and Gibbs v Australian Wool Corporation (1990) HREOC1 1.*

84. *In effect, these cases have determined that two roles will not be considered to be comparable simply because they are at the same salary level. More is required. In particular, the duties and responsibilities of the roles must be of a similar importance and status, the roles must be of a similar duration (that is, if a former role was for on-going employment, the new role offered cannot be for a fixed term) it must have similar*

promotional opportunities, have the same terms and conditions at the former position and have similar opportunities in relation to increasing experience and/or knowledge of an area of expertise.

85. *DHS had consideration to each of these factors when it identified new positions that would be available for Ms Robertson. DHS denies that the new roles that it offered to Ms Robertson were not comparable to her old position.*

86. *The positions offered by DHS to Ms Robertson were created on the basis of generic Grade 6 specifications which used the Grade 6 descriptors and value ranges that were agreed between the Victorian Government and the CPSU in 2003. The use of the accepted descriptors and value ranges ensures that the jobs are at the same equivalent classification and salary level and are appropriately classified under the industrially agreed system. Moreover, where two jobs are appropriately classified in accordance with the Grade and Value Range Descriptives, they will be of equivalent complexity and status, notwithstanding any superficial differences that may exist between the two roles.*

87. *Although the new roles offered are not identical with Ms Robertson's "old" role in respect to program and budget responsibilities, they are clearly within the generic Grade 6 role and function/dimension specifications and as such are appropriate alternative positions. All the roles that have been offered to Ms Robertson are on going positions, are accepted public sector roles, are paid at the same level and have the same promotional opportunities as Ms Robertson's "old" position.*

88. *DHS has sought to discuss potential positions and areas of interest with Ms Robertson on several occasions. Ms Robertson has stated that she has no interest in other program areas nor in a significant statewide operation position which was offered to her on a short term basis, stating that she only wanted to work in the child welfare area in a non-operation role.*

89. *Positions in the child welfare area in other Branches of the Division have also been rejected by Ms Robertson due to her perception of the management of those areas.*

90. *While Ms Robertson asserts that none of the positions offered are comparable however she appears to be seeking an identical position rather than a comparable position. No identical position exists. Moreover, schedule 14 of the Act does not require an employer to provide an employee with an identical role. Clause 12(3) of schedule 14 of the Act merely requires an employer to engage an employee in a position that is "nearest in status and remuneration" to the employee's former position. As such, DHS is not required to provide an alternative role for Ms Robertson that is identical to her former role with respect to budget and program responsibility. DHS is required and has endeavoured to provide Ms Robertson with a role that is as close in status as possible to her former position when the two roles are considered as a whole. DHS submits that the roles that it has offered to Ms Robertson satisfy its obligations under clause 12(3) of schedule 14 of the Act.*

91. *Further, it is important to note that while Ms Robertson has recently asserted that she will only consider an alternative role in the child welfare area, the first "alternative" position that DHS offered to Ms Robertson after it had advised her that she was unsuccessful in her application for the EO position was in the child welfare area, within the Branch. The job title was Manger, Out of Home Care Quality*

Improvement. Although this position was a VPS-6 role it was rejected by Ms Robertson on the basis that she “wanted her old job back”.

92. While a VPS-6 position exists for Ms Robertson (as evidenced by the positions that have been offered to her), Ms Robertson’s “old job”, that is, the position of Manager, Out of Home Care Specialist Support no longer exists. While DHS has, and will continue to make every attempt to locate a role for Ms Robertson that satisfies its obligations under Schedule 14 of the Act and provide a suitable range and variety of work for Ms Robertson at level, Ms Robertson is unable to return to her former position because it no longer exists.

CONSULTATION

93. The CPSU has alleged that DHS failed to consult with either it or Ms Robertson as required by the VPS Agreement. As discussed above, the 2004 Agreement did not commence operation until June 2004. As such, DHS’ obligations in relation to the requirement to consult are governed by clause 15 of the 2001 Agreement.

94. Clause 15 of the 2001 Agreement sets out the steps that DHS is required to take if it decides to “introduce new technology or changes to existing work practices of Employees” Specifically clause 15 requires DHS to:

- (i) advise the affected employee(s) and the CPSU of the proposed change as soon as practicable after the proposal has been made;*
- (ii) advise the affected employee(s) and the CPSU of the likely effect on the employee’s working conditions and responsibilities;*
- (iii) advise the rationale and intended benefits of any change; and*
- (iv) regularly consult with the affected employee and the CPSU and give prompt consideration to matters raised by the employee or CPSU.*

95. DHS complied with the requirements of clause 15 of the 2001 Agreement. Specifically, DHS:

(i) Contacted Ms Robertson in January 2004 and advised her that the EO position had been created. It was not reasonably practicable to advise either Ms Robertson or the CPSU of the creation of the EO position any earlier because final arrangements in relation to recruitment for the position were still being made. Ms Robertson was advised in advance of the EO position being advertised and in advance of a general announcement being made to all other DHS employees that the EO position had been created. Moreover, DHS advised the CPSU about the creation of the new EO position on 27 January 2004.

(ii) When Ms Callister rang Ms Robertson on 9 January 2004 to advise her about the creation of the EO position Ms Callister also advised Ms Robertson that if she was not the successful applicant for the role they would need to discuss her ongoing role with DHS and her duties and responsibilities as the new EO position would subsume many of the duties that she had been responsible for before she went on leave.

(iii) When Ms Callister spoke to Ms Robertson on 9 January 2004, Ms Callister also explained to Ms Robertson that the EO position was being created because the current level of management within the Branch was insufficient to meet the new responsibilities that were being created as a result of the implementation of the reform agenda

announced by the Minister for Community Service. DHS has continued to provide this information to Ms Robertson and the CPSU throughout various legal proceedings since February 2004.

(iv) DHS has regularly consulted with Ms Robertson and the CPSU in relation to the recruitment for the EO position, the broad scope of the duties and responsibilities of the EO position, the fact that this role would subsume many of the duties of Ms Robertson's VPS-6 role and the alternative opportunities available for Ms Robertson within DHS. DHS attempts to consult have been hampered by Ms Robertson's ongoing refusal to meet with members of DHS or to attend an interview where she would have been provided with more information about the scope of the EO position. Attempts to consult have also been hampered by Ms Robertson's absences from the workplace. Moreover, since Mr Clements' appointment to the EO position. DHS has attempted to consult with Ms Robertson in relation to the scope of her role within DHS moving forward. Again DHS's ability to do this has been hindered by Ms Robertson's refusal to consider alternative positions. Apart from the matters referred to above, neither Ms Robertson nor the CPSU have raised any other matter which required DHS' prompt consideration.

96. For the reasons set out herein the referral of the dispute to the Commission should be dismissed."

[51] The DHS filed the following closing submissions (Exhibit DHS-19) [footnotes omitted]:

1. In accordance with clause 12 of the Victorian Public Service Agreement 2004 (the 2004 Agreement), the Community and Public Sector Union (the CPSU) notified the Australian Industrial Relations Commission of a dispute between itself and the Department of Human Services (DHS).

2. The Form R47 Notice under a Dispute Settling Procedure in an Agreement dated 7 March 2005 (the CPSU Notice) which forms the basis of this application alleges the following:

(a) DHS failed to apply clause 48 of the 2004 Agreement and Schedule 14 of the Act in respect of a DHS employee, Ms Robertson;

(b) Ms. Robertson was denied by DHS the right to return to the position she held immediately before she began maternity leave on 29 March 2003; and

(c) If the position which Ms. Robertson held immediately before she began maternity leave on 29 March 2003 no longer exists, DHS failed to provide Ms. Robertson with a comparable position that is nearest in status and remuneration to the position she held immediately prior to proceeding on maternity leave.

3. The dispute was notified to the Commission pursuant to s.170LW of the Workplace Relations Act 1996 (Cth) (the Act). Section 170LW of the Act provides as follows:

170LW

Procedures in a certified agreement for preventing and settling disputes between the employer and employees whose employment will be subject to the agreement may, if the

Commission so approves, empower the Commission to do either or both of the following:

- (a) to settle disputes over the application of the Agreement;*
- (b) to appoint a board of reference as described in s.131 for the purpose of settling such disputes.*

4. A dispute settling clause in a certified agreement can only empower the Commission to deal with “disputes over the application of the agreement”. Such disputes include:

- (a) Disputes over whether the agreement applies in particular circumstances; and*
- (b) Disputes over how the agreement applies in particular circumstances.*

5. As noted above, the powers of the Commission pursuant to s.170LW of the Act are restricted to the settlement of disputes regarding the application of an agreement. The CPSU Notice dated 7 March 2005 alleges that DHS failed to apply clause 48 of the 2004 Agreement and, in particular, clause 48.1 of the 2004 Agreement. Clause 48.1 provides as follows:

Parental leave means paid and unpaid maternity leave, paternity/ partner and adoption leave and shall be provided in accordance with Schedule 14 to the Workplace Relations Act 1996, subject to the following provisions of this clause.

6. The relevant part of Schedule 14 of the Act is clause 12, which provides as follows:

12(1) This clause applies when an employee returns to work after a period of Schedule 14 maternity leave.

12(2) The employer must employ her in the position she held:

- (a) if she was transferred to a safe job because of her pregnancy – immediately before the transfer; or*
- (b) if she began working part time because of the pregnancy – immediately before she so began; or*
- (c) otherwise – immediately before she began maternity leave.*

12(3) If that position no longer exists but she is qualified for, and can perform the duties of, other positions in the employer’s employment, the employer must employ her in whichever of those positions is nearest in status and remuneration to the position referred to in sub-clause (2).

7. In the circumstances of this application, DHS’ obligations to Ms. Robertson pursuant to clause 12 of Schedule 14 of the Act were as follows:

- (a) upon Ms. Robertson’s return from maternity leave on 29 March 2004, to employ her in the position she held “immediately before she began maternity leave” (clause 12(2)(c)); or*
- (b) if that position was no longer available, to employ her in another position “nearest in status and remuneration” to the position she held before she began maternity leave (clause 12(3)).*

8. DHS’s primary submission is that at the time she departed on maternity leave on 29 March 2003, Ms. Robertson occupied the position of Manager, Service Development

(VPS5). In July 2003, as a consequence of an increase to the duties and responsibilities of the position and the finalisation of a restructure within the Child Protection and Juvenile Justice Branch (the Branch), the position was retitled Manager, Out of Home Care and Specialist Support (VPS5). Upon her return from maternity leave on 29 March 2004, Ms. Robertson returned to the position of Manager, Out of Home Care and Specialist Support (VPS-6) (her Original Position) in the Branch. In these circumstances, DHS submits that it complied with its obligations pursuant to clause 12(2)(c) of Schedule 14 of the Act.

9. A chronology of relevant events is attached to these submissions as Attachment A.

The evidence regarding Ms. Robertson's return from maternity leave

10. Mr. Hall informed Ms. Robertson on two occasions prior to her return from maternity leave that she would be returning to her Original Position. Evidence was given by representatives of DHS that upon her return from maternity leave on 29 March 2004, Ms. Robertson did return to her Original Position.

11. During the course of her evidence in chief and cross-examination, Ms. Robertson conceded that upon her return from maternity leave, she returned to her Original Position. Additionally, under questioning from the Commission, Ms. Robertson testified that upon her return from maternity leave she returned to the position which she had held before she went on maternity leave on 29 March 2003. She further testified in cross-examination that on her return from maternity leave, Mr. Clements provided her with a full briefing on all the work he had been performing while acting in her Original Position. This accords with the evidence of Ms. Callister and Mr. Clements. Ms. Robertson also testified in cross-examination that she remained in her Original Position until 6 June 2004.

12. However, Ms. Robertson testified that in her opinion she (in effect) only returned to her Original Position nominally as:

(a) The return was "temporary" because the duties and responsibilities of her position were to be subsumed into the newly-created position of Manager, Placement and Support (EO-3), once that position was filled and activated; and/or

(b) Upon her return from maternity leave on 29 March 2004 to her Original Position, duties and responsibilities were removed from her and allocated elsewhere within DHS. DHS's response to each of these claims is set out below.

Return on a "temporary" basis to position of Manager, Out of Home Care and Specialist Support

13. As noted above, the evidence adduced before the Commission was that upon Ms. Robertson's return from maternity leave, she returned to her Original Position. The position of Manager, Placement and Support (EO-3) did not become active until Mr. David Clements was appointed to the position (on an acting basis) on 6 June 2004. Between 29 March 2004 and 6 June 2004, Ms. Robertson occupied her Original Position, which she agreed was the case during cross-examination.

14. DHS submits that the relevant point in time which must be considered for the purposes of clause 12 of Schedule 14 of the Act is the time when the employee returns from maternity leave – in this case, 29 March 2004. This is apparent from the wording of clause 12(1) of the Schedule 14 which provides:

This clause applies when an employee returns to work after a period of Schedule 14 maternity leave (emphasis added).

15. *Moreover, Ms. Robertson returned to the position for a substantial period of time (over two months). Ms Robertson continued to occupy the position, performing the duties and responsibilities involved in it, while the position and those duties and responsibilities continued to exist i.e until the appointment of Mr. Clements to the position of Manager, Placement and Support on 6 June 2004.*

16. *The consequences if the argument of the CPSU was accepted is that an employer must not only ensure that an employee returns to the position which she occupied before she departed on maternity leave (assuming the position still exists), but also maintain her in that position after the employee returns from maternity leave for an indeterminate period of time. This would, for example, prevent an employer from ever restructuring its workforce, or restructuring (and possibly eliminating altogether) the position which the employee has returned to after her maternity leave ends. Such a result could not be reasonably contemplated. Indeed, in response to questioning from the Commission, Ms. Robertson accepted that there can be no guarantee that an employee's position will not change after she returns from maternity leave.*

Removal of duties

17. *In her evidence, Ms. Robertson testified that in the three day period following her return from maternity leave, a number of duties and responsibilities which she performed prior to her departure on maternity leave were removed from her. Ms. Callister specifically denied that she removed any responsibilities from Ms. Robertson's position after her return from maternity leave.*

18. *The examples Ms. Robertson provided of the removal of duties and DHS' response to those examples are as follows:*

(a) *Quality assurance. Ms. Robertson testified that one of her responsibilities in the position of Manager, Out of Home Care and Specialist Support, prior to her departure on maternity leave was to undertake quality assurance work. She testified that upon her return from maternity leave, Mr. Clements was required to assist the Office of Child Advocate and took the "quality assurance" work with him. However, Ms. Callister testified that the quality assurance work being undertaken by Mr. Clements was not the work previously undertaken by Ms. Robertson, but instead was a specific initiative in relation to a special quality assurance framework announced by the Minister in June 2003 while Ms. Robertson was on maternity leave. Ms. Callister testified that Mr. Clements had been given responsibility for this work at that time and that it was appropriate in the circumstances for him to maintain responsibility for that work. Mr. Clements' evidence was to the same effect. In this regard, Ms. Robertson conceded in cross-examination that the specific allocation of funds to quality assurance in June 2003 was the first time that such an allocation had occurred.*

Ultimately, DHS submits, the Commission should find that there was no removal of quality assurance work from Ms. Robertson's Original Position, as this project only arose while Ms. Robertson was on maternity leave. Indeed, in cross-examination Ms. Robertson acknowledged that Mr. Clements had informed her of this new initiative upon her return from maternity leave, that she was kept advised of the work being undertaken on it, and that an employee in her area worked on the project with Mr. Clements. In effect, part of the work remained in Ms. Robertson's area and she retained an involvement in it, through the involvement of one of her staff members.

(b) *Foster care initiative.* Ms. Robertson testified that one of the duties and responsibilities removed from her upon her return from maternity leave was work in the area of foster care. Ms. Callister denied this, testifying that overall responsibility for the foster care initiative was allocated to another DHS employee (Mr. Norton) who worked in a different branch to that of Ms. Robertson and who was responsible for new budget initiatives, of which the foster care initiative was one. Ms. Callister further testified that while Mr. Norton individually maintained responsibility for the initiative, assistance was still required from DHS employees working within Ms. Robertson's area.

(c) *Sector development plan.* Ms. Robertson gave evidence that before her departure on maternity leave, she worked upon the industry development plan, but that after her return from maternity leave she was told that her involvement in this project was no longer required. However, Ms. Robertson conceded in cross-examination that prior to her departure on maternity leave, there was no sector development plan co-chaired by a Member of Parliament and the CEO of a non-government agency. Ms. Callister testified that in her opinion, there was no removal of this responsibility from Ms. Robertson. She testified that the Sector Development Plan, which was what Ms. Robertson appeared to be referring to, was a project led by Mr. Hall and that it involved work in a number of different areas of the branch, including that of Ms. Robertson. Again, DHS submits that the sector development plan was a new initiative and in those circumstances it could not have been removed from Ms. Robertson's area as it was not in her area at the time of her departure on maternity leave.

(d) *Ministerial Advisory Committee (MAC).* Ms. Robertson testified that she was not provided with the papers for a meeting of the Ministerial Advisory Committee, a new initiative which she accepted in cross-examination did not form part of her duties and responsibilities prior to her departure on maternity leave. Ms. Callister, DHS submits, provided a cogent and reasonable explanation for why the papers were not provided to Ms. Robertson, as her attendance at the meeting was not required. In any event, Ms. Robertson testified that she ultimately did attend these meetings. In those circumstances, it is difficult to see how Ms. Robertson was deprived of any responsibility.

19. In summary, DHS submits that on 29 March 2004, Ms. Robertson returned to the position she had occupied before she went on maternity leave some twelve months earlier – the position of Manager, Out of Home Care and Specialist Support. The responsibilities which she alleges were removed from her were, as Ms. Callister testified, new initiatives which Ms. Robertson had not been involved in prior to her departure on maternity leave. In some cases, she had an involvement in those new initiatives on her return.

Whether position of Manager, Placement and Support (EO-3) was Ms. Robertson's Original Position

20. Ms. Robertson testified at length that the EO-3 position of Manager, Placement and Support, was, in effect, her former position of Manager, Out of Home Care and Specialist Support. The DHS submissions now turn to that issue.

21. The evidence of Ms. Callister was that as a consequence of restructuring within the Community Care Division of DHS in late 2002 and early 2003, the duties and responsibilities in the area for which Ms. Robertson was responsible expanded considerably. Mr. Clements, who acted in Ms. Robertson's position while she was on maternity leave, agreed. Mr Hall gave evidence that the duties and responsibilities

which formed part of the EO-3 role were significantly different to the duties performed at the VPS level. Ms. Robertson conceded in cross-examination that Ms. Callister would have had a better understanding of the changes which had occurred within her area during her 12 month absence on maternity leave than she herself had.

22. The restructuring was only finalised in approximately June-July 2003, when Ms. Robertson was already on maternity leave. Ms. Robertson agreed that this was the case. Shortly after the restructuring had been completed, on or about 12 August 2003 Mr. Hall drafted a submission requesting the creation of an additional Executive Officer position within the Community Care Division to manage the Out of Home Care and Specialist Support functions. He testified that the request was made due to the expansion of work in the area, and the need for it to be managed at the executive level. Ultimately, permission was given for the creation of the new Executive Officer position on or about 29 November 2004.

23. Both Ms. Callister and Mr. Hall testified that the Executive Officer position was a new position, and differed from the position of Manager, Out of Home Care and Specialist Support occupied by Ms. Robertson. They testified that as an Executive Officer position, it required strategic management skills and participation in the executive management team of the Child Protection Branch, unlike Ms. Robertson's original position.

24. The Commission, DHS submits, should accept the evidence of Ms. Callister and Mr. Hall, which was not undermined in cross-examination. During cross-examination, Ms. Robertson acknowledged that there is a real division, in terms of employment, between VPS positions and Executive Officer positions. Ms. Robertson also acknowledged that in the position of Manager, Out of Home Care, Specialist Support, she did not participate in the executive management team, and that this is one of the key aspects of the position of Manager, Placement and Support. Ms. Robertson also conceded in cross-examination that the VPS classified positions – of which her Original Position was one – do not form part of the corporate leadership group.

25. Finally, and crucially, Ms. Robertson conceded during cross-examination that in the past 2 years, she had only worked in the Branch (now known as the Child Protection and Family Services branch) for a period of approximately two and a half months. She also conceded that her knowledge of the requirements of the Executive Officer position of Manager, Placement and Support is not drawn from direct experience or knowledge. This is to be contrasted with the direct experience and knowledge which both Ms. Callister and Mr. Hall have. In those circumstances, DHS submits that the Commission should prefer the evidence of Ms. Callister and Mr. Hall in respect of the nature of the Executive Officer position to that of Ms. Robertson.

26. Ms. Callister informed Ms. Robertson of the creation of the new Executive Officer position of Manager, Placement and Support in a telephone discussion on 9 January 2004. While the evidence of Ms. Callister and Ms. Robertson differed on what precisely was said during that discussion, they essentially agreed on what were the principal elements of the discussion. Ms. Robertson agreed that Ms. Callister told her that a new Executive Office position was being created to manage the Out of Home Care and Specialist Support function. She also agreed that Ms. Callister told her that another position would be available for her at the VPS-6 level if her application for the new Executive Officer position was unsuccessful.

27. *The one aspect of the discussion where the recollections of Ms. Callister and Ms. Robertson differed was in relation to whether Ms. Callister encouraged Ms. Robertson to apply for the new Executive Officer position. Ms. Callister testified that she did encourage Ms. Robertson to apply, Ms. Robertson testified that she did not. In circumstances where subsequent written correspondence from DHS encouraged Ms. Robertson to apply for the position, DHS submits that the Commission should find that it was more likely than not that Ms. Callister did encourage her to apply for the position. Ultimately, however, it is probably irrelevant – for Ms. Robertson testified that in the past, she had applied for other positions, even if she had not been encouraged to do so. Of course, ultimately Ms. Robertson did apply for the position*

28. *Ms. Robertson testified at length about the uncertainty in her mind after speaking with Ms. Callister. However, DHS submits that whatever uncertainty was in Ms. Robertson’s mind ought to have been clarified by the letter dated 16 January 2004 which Ms. McKinnon sent to Ms. Robertson after the telephone discussion between Ms. Callister and Ms. Robertson. The terms of the letter are clear and unambiguous and provide:*

- (a) The position of Executive Officer to manage the Out of Home Care and Specialist Support functions was a new position;*
 - (b) The position was being created due to the increased complexity, responsibility and accountability that this area of work has attracted over the past 12 months*
 - (c) Ms. Robertson was encouraged to apply for the new position;*
 - (d) If Ms. Robertson was unsuccessful in an application for the position, she would continue to be a senior member of the CP and JJ Branch. (emphasis added)*
- Creation of the position of Manager, Placement and Support (EO-3) a “sham”*

29. *The suggestion by the CPSU that the creation of the Executive Officer position by DHS was a “sham”, and a calculated attempt by DHS to deprive Ms. Robertson of her entitlements pursuant to clause 12 of Schedule 14 of the Act is fanciful, and should be rejected by the Commission out of hand.*

30. *In Sharrment Pty Ltd v Official Trustee in Bankruptcy , Lockhart J. defined “sham” in the following terms:*
A ‘sham’ is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.

31. *The Commission would have to be satisfied that not only did Mr. Hall participate in such a “sham”, but that so too did Ms. Pam White (the then Executive Director of the Community Care Division) who submitted to the Secretary of DHS the request for the creation of the Executive Officer position, and the Secretary of DHS who authorised the creation of the position in the Community Care Division.*

32. *Such a serious allegation, which essentially is one alleging fraud on the part of Mr. Hall, Ms. White and the Secretary of DHS, demands exactitude of proof, and not indefinite testimony or indirect inferences. Indeed, in accordance with the well known principles in Browne v Dunn, the allegation should have been put to Mr. Hall and Ms. Callister – but it was not. There is no evidence whatsoever of any such fraud and the allegation should be dismissed out of hand by the Commission.*

Allegations by Mr. Robertson of bullying and harassment

33. *Ms. Robertson gave evidence of alleged incidents which occurred following her return from maternity leave which, she claimed, constituted bullying and harassment on the part of DHS. In particular, she singled out Ms. Callister as engaging in such behaviour.*

34. *DHS's primary submission is that this issue is not referred to in the CPSU Notice dated 7 March 2005. It is not an issue which arises from the application of the 2004 Agreement. Accordingly, the Commission is not empowered, nor is it necessary, for it to make any determination in relation to this particular issue.*

35. *However, if the Commission is minded to make a determination in respect of this issue, DHS submits that there is no proper evidentiary basis for it to find that Ms. Robertson was bullied or harassed by DHS or its representatives (and, in particular, Ms. Callister). In this regard, DHS submits the following:*

(a) *Ms. Robertson testified that prior to her departure upon maternity leave, she enjoyed a professional and cordial working relationship with Ms. Callister. During her absence on maternity leave, she visited Ms. Callister in her office and spoke with her in a perfectly agreeable and normal manner. Further, Ms. Robertson testified that in the days immediately following her return from maternity leave, Ms. Callister was polite and cordial to her;*

(b) *There is no evidence of any personal antipathy ever existing between Ms. Callister and Ms. Robertson prior to Ms. Robertson going on maternity leave. Before Ms. Robertson went on maternity leave, Ms. Callister gave her a baby cradle. While Ms. Robertson was on maternity leave, she visited the workplace and had a friendly discussion with Ms. Callister about the trials and tribulations of motherhood. Upon her return from maternity leave, Ms. Callister organised a morning tea for Ms. Robertson on her first day back at work, attended the morning tea and spoke amicably with Ms. Robertson at that time.*

36. *In respect of the specific incidents which were the subject of Ms. Robertson's evidence, DHS submits the following:*

(a) *Ms. Robertson gave evidence that Ms. Callister did not arrange to immediately meet with her upon her return from maternity leave on 29 March 2004. However, the evidence was that a meeting was arranged between Ms. Callister and Ms. Robertson on Tuesday, 30 March 2004, to take place on 1 April 2004. Ultimately, that meeting did not take place because Ms. Robertson was on sick leave from 1 April 2004 to 23 April 2004. Ms. Callister gave evidence that she had asked her personal assistant to arrange a meeting and because of both her work commitments and those of Ms. Robertson, the first available day for them to meet was Thursday, 1 April 2004. She also testified that she had been informed by Mr. Clements that Ms. Robertson would be heavily involved in meetings on the first two days of her return. Further, she testified that in circumstances where Ms. Robertson was clearly aggrieved by the creation of the new Executive Officer position, she felt it was best to wait a few days before having a formal meeting. DHS submits that this was a proper and reasonable course of action for Ms. Callister to take.*

While Ms. Robertson may have felt slighted that Ms. Callister did not meet with her immediately upon her return, an arrangement was made for them to meet on the fourth day of her return. In circumstances where both Ms. Callister and Ms. Robertson were busy, the meeting was not unduly delayed. While DHS does not deny that Ms.

Robertson may have felt slighted, it submits there was no reasonable or proper basis for her perception.

(b) Ms. Robertson gave evidence about the transfer of Mr. Clements to assist the Office of the Child Advocate shortly after her return from maternity leave. She claimed Ms. Callister did not discuss this with her. DHS submits that there was nothing untoward about Ms. Callister's behaviour. Attachment 15 to Ms. Robertson's supplementary statement shows the following:

(i) On 30 March 2004, Mr. Hall wrote to Ms. Callister seeking her agreement for Mr. Clements to work with the Advocate and for him to do that as soon as possible, i.e. today;

(ii) Ms. Callister forwarded this email to both Ms. Robertson and Mr. Clements, stating she thought this was a good idea and that she would discuss this with both of them later;

(iii) Ms. Robertson replied to Ms. Callister's email, noting that with Mr. Clements taking up the role "things may be a bit tight" in her area, but she was sure that Mr. Clements would enjoy the opportunity.

At no time did Ms. Robertson express any opposition to Mr. Clements' move. She conceded this in cross-examination. While Ms. Callister did not speak with Ms. Robertson, she wrote via e-mail to Ms. Robertson seeking her views on the matter and Ms. Robertson provided those views by return e-mail, supporting the move. Ms. Robertson testified that she felt Ms. Callister should have approached her personally and discussed the matter at greater length with her before Mr. Clements moved. However, this ignores the urgency of Mr. Hall's request, Ms. Callister's busy work schedule, and the fact that ultimately Ms. Callister did seek Ms. Robertson's input into the suggested move and Ms. Robertson provided that input. There is no substance to Ms. Robertson's claim that this constituted bullying or harassment.

(c) Ms. Robertson testified that a meeting called by Ms. McKinnon dealt with employees returning to work after maternity leave, and that as a result of her personal circumstances it was inappropriate for such a meeting to be conducted. However, the evidence of Ms. McKinnon was that the meeting was not called to discuss employees returning from maternity leave, but rather employees generally returning from periods of long leave. Ms. Robertson conceded in cross-examination that the purpose of the meeting may have been to discuss employees returning to work after extended periods of leave, due to confusion among managers in relation to what positions such employees should return to.

Ms. McKinnon further testified that the meeting focused upon employees returning from leave who wished to return to a different position to that in which they had been employed before they had gone on leave and stated that the discussion did not centre upon employees returning from maternity leave. Ms. McKinnon's evidence in this regard was not the subject of any cross-examination by the CPSU and, DHS submits, the Commission should prefer it to the evidence of Ms. Robertson.

(d) Meeting on 30 April 2004. A meeting was conducted between Ms. Callister and Ms. Robertson on 30 April 2004, with Ms. Vicki Lahey present as a support person for Ms. Robertson. Ms. Robertson alleged that Ms. Callister's demeanour in that meeting was intimidating and aggressive. Ms. Callister denied this. Ms. Lahey's evidence, which was not the subject of any cross-examination by the CPSU, was that Ms. Callister was direct, firm and matter of fact – but she was not unfriendly, not unprofessional, and not in any way aggressive. In the absence of any cross-examination, the Commission should accept Ms. Lahey's evidence in this regard and find that Ms. Callister did not behave in a bullying or harassing manner during this meeting.

37. The evidence supports a finding that after she was informed by Ms. Callister on 9 January 2004 of the creation of the new Executive Officer position, Ms. Robertson was concerned about her position within DHS in the event that her application for the new position was unsuccessful. Prior to returning to work from maternity leave on 29 March 2004, she had corresponded on a number of occasions with Ms. McKinnon and Mr. Hall, but was still deeply unhappy about the situation. In February 2004 she lodged an Internal Grievance within DHS challenging the creation of the new Executive Officer position. On 16 March 2004 she filed an equal opportunity complaint against both DHS and Ms. Callister in the Equal Opportunity Commission of Victoria. In those circumstances, DHS submits that the Commission can infer that Ms. Robertson was in a fragile and sensitive state when she returned to work from maternity leave on 29 March 2004. In such a state, it might be understandable for Ms. Robertson to regard the above incidents upon her return from maternity as upsetting. However, DHS submits that when each of the above incidents is considered in its totality, they do not – either in isolation or taken together – make her reaction reasonable. More particularly, they do not provide any basis for a finding that Ms. Robertson was the subject of bullying or harassment.

Allegation that the EO-3 position is in fact the VPS-6 position

38. During the course of the hearing, the CPSU submitted that the position of Manager, Placement and Support – an Executive Officer Level 3 position – is, in fact, the position of Manager, Out of Home Care and Specialist Support formerly occupied by Ms. Robertson. The CPSU is seeking orders that the Commission appoint Ms. Robertson to that position. DHS strongly opposes the making of any such order, on the following basis.

39. The evidence adduced on behalf of DHS supports a conclusion that the position of Manager, Placement and Support (EO-3) is a new position and not Ms. Robertson's former position of Manager, Out of Home Care and Specialist Support (VPS-6).

40. In particular, Mr. Hall testified that there are significant differences between the roles and the levels of responsibility, leadership and autonomy exercised by executives (EO classifications) and non-executives (VPS classifications). Mr Hall testified that the position of Manager, Placement and Support involved working as part of the divisional executive management team, and direct and authoritative engagement and liaison with the Minister's office, the Ministerial Advisory Committee, the Office for Advocate for Children in Out of Home Care and senior staff from agencies and regions to autonomously implement key policy priorities. He added that these key aspects of the Executive Officer position did not form part of Ms. Robertson's position prior to her departure on maternity leave. This evidence, DHS submits, was not undermined in cross-examination.

41. Moreover, the Commission should not make any order appointing Ms. Robertson to the position of Manager, Placement and Support for the following reasons:

(a) DHS' principal submission is that the Commission is restrained from making such an order. In *Re Australian Education Union and Ors v Ex parte the State of Victoria and Anor*, the High Court was called upon to determine the ability of the Commission to issue awards which had the effect of preventing the State of Victoria from terminating the employment of its employees due to redundancy. In *Re AEU*, the High Court affirmed the limitation on the power of the Commission to restrict the ability of States and their agencies to determine to whom they will offer employment, including

qualifications and eligibility for employment and terms of employment. In that context, the Court made the following observations:

In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group.

and

... the operation of the implied limitation would preclude the Commission from making an award binding the States in relation to qualifications and eligibility for employment, term of appointment and terminations of employment, at least on the ground of redundancy. It would also preclude the Commission from making an award binding the States in relation to the terms and conditions of employment or engagement of persons such as Ministers, ministerial assistants and advisers, heads of department and senior office holders...

In this case, the CPSU is seeking that the Commission make an order – that Ms. Robertson be appointed to the Executive Officer position of Manager, Placement and Support – which (on its face) clearly infringes the implied constitutional limitation identified in Re AEU. This is because any such order would have the effect of compelling DHS to engage Ms. Robertson in a senior office, the office of Manager, Placement and Support (EO-3) i.e a member of the executive service of DHS, an agency of the State of Victoria.

DHS notes that the 2004 Agreement makes no provision for the powers of the Commission, or in particular the remedies it may order, when exercising its powers pursuant to clause 12 of the 2004 Agreement. In Telstra Corporation Limited v CEPU, the Full Bench held that in settling disputes over the application of an agreement, the Commission exercises powers conferred by the Act. While it is not clear, presumably the CPSU is relying upon the power of the Commission to make an “order” pursuant to s.111(1)(b) of the Act.

If that is the case – and DHS submits that there can be no other express power available to the Commission to grant the order sought by the CPSU – it must be confined by the implied constitutional limitation identified in Re AEU.

(b) The 2004 Agreement sets out the terms and conditions of employment for DHS employees occupying VPS classified positions. It does not deal with the terms and conditions of employment of Executive Officers, or (in particular) the appointment of individuals to Executive Officer positions. For the Commission to grant orders of the nature sought by the CPSU would involve it moving beyond the scope of the 2004 Agreement. In those circumstances, any such orders would not be part of a settlement of a dispute relating to the “application of an agreement”, in accordance with section 170LW(1)(a) of the Act.

42. *If the Commission determines that it does have the power to make an order of the nature sought by the CPSU, DHS submits that it should exercise its discretion not to make such an order, as:*

(a) While Ms. Robertson did apply for the Executive Officer position, she did not attend a second interview, despite repeated attempts by DHS to facilitate such an interview occurring. Ms. Robertson ultimately declined to attend an interview and testified that it was not any surprise to her that she was not appointed to the position in those circumstances.

(b) Mr. Clements was appointed to the Executive Officer position after a merit based selection process. In effect, Ms. Robertson is seeking an order that she be appointed to

the position he currently occupies and which he has occupied since June 2004, notwithstanding her decision not to attend an interview and participate in a merits-based assessment.

(c) The process whereby the Executive Officer position was created, advertised and filled, was in complete conformity with DHS's internal procedures and guidelines.

Obligation to provide a position “nearest in status and remuneration” – clause 12(3) of Schedule 14 of the Act

42. If the Commission does not accept DHS' primary submission that Ms. Robertson returned to her Original Position after the expiry of her maternity leave on 29 March 2004, and accepts its submission that the Executive Officer position of Manager, Placement and Support is not her Original Position, it must determine whether DHS has breached its obligations to Ms. Robertson in respect of clause 12(3) of Schedule 14 of the Act.

43. Under clause 12(3) of Schedule 14 of the Act, an employer is only required to provide to an employee returning from maternity leave a position “nearest in status and remuneration” to her former position if her former position no longer exists. However, as noted above, DHS' primary submission is that Ms. Robertson did return to her Original Position and worked in that position until 6 June 2004. In those circumstances, DHS submits, it is not necessary for the Commission to consider whether DHS was obliged to provide another position to her pursuant to clause 12(3) of Schedule 14 of the Act.

44. If the Commission determines that DHS was obliged to find an alternative position for Ms. Robertson after 6 June 2004, clause 12(3) only requires DHS to provide to her a position which is “nearest in status and remuneration” to her Original Position. The word “comparable” does not appear in clause 12(3) of Schedule 14 of the Act and its use by the CPSU and Ms. Robertson is an attempt to argue that any alternative positions offered to Ms. Robertson had to be of equivalent or similar status and remuneration to her Original Position. However, the use of the word “nearest” in clause 12(3) contemplates that an alternative position which may be offered to an employee returning from maternity leave may be inferior in terms of both status and remuneration – provided it is the closest available in terms of status and remuneration. There is no obligation in clause 12 for an employer to provide an employee returning from maternity leave with a “comparable” position.

45. There is no dispute between the parties that the different positions which have been offered to Ms. Robertson by DHS since 6 June 2004 are all VPS-6 classification positions upon the same remuneration as that which she enjoyed prior to departing on maternity leave. The issue, accordingly, is one of whether those positions are “nearest” in “status” to Ms. Robertson's Original Position.

46. It is important to recall that at the time of her departure on maternity leave, the duties and positions in the position of Manager, Out of Home Care and Specialist Support was being expanded due to restructuring within the relevant branch of DHS. The number of reports to Ms. Robertson was anomalous and only occurred for a brief period of time before senior management of DHS took steps to create an Executive Officer position to manage the relevant function.

47. *In relation to the various positions which were offered to Ms. Robertson, her criticisms were varied – she claimed that the positions either involved a diminution in the number of direct staff reporting to her, or dealt with areas of responsibility which were not within her chosen career path, or involved a reduction in the level of budget responsibilities, or involved reporting to an employee classified at the VPS level rather than an Executive Officer. In this regard, DHS submits the following.*

48. *Notwithstanding her evidence that she had budget responsibility for approximately \$140 million in her position of Manager, Out of Home Care and Specialist Support, DHS’s evidence was that Ms. Robertson had no such responsibility. While the areas upon which she provided policy development and program advice involved programs with a budget of \$140 million, she had no responsibility for the allocation of funds, the spending of those funds, or the consequences if budgets were exceeded. Such responsibilities lie with the regional directors of DHS.*

49. *In respect of the issue of budget, Ms. Robertson conceded in cross-examination that:*

- a. Decisions in relation to the allocation of budgets are not made at the VPS level;*
- b. Regional Directors were responsible for any over-expenditure of budgets;*
- c. In her Original Position, she had no power to make any decisions in relation to the allocation of funds, just recommendations;*
- d. Decisions in relation to budgeting matters were, in certain circumstances, made at the Executive Office level.*

DHS submits that Ms. Robertson’s claim that she had “budget responsibility” for programs in the vicinity of \$140 million should be rejected.

50. *While the number of staff reporting to Ms. Robertson in the various positions offered to her were less than in her Original Position, that in itself is not a sign of “status”. Moreover, the Commission should bear in mind that the number of staff reporting to Ms. Robertson prior to her departure on maternity leave was an anomalous and temporary situation within the Department, which occurred as a result of the restructuring which took place during 2002 and 2003.*

51. *A number of the positions which DHS has offered to Ms. Robertson, and which she has refused to accept, provide her with elements which she accepted were near to those of her former position. Ms. Robertson conceded that the position of Manager, Young Support Services Unit, was a VPS-6 classified position, reporting to an Executive Director, dealing with her chosen career path of policy and program development. She conceded that the offer of the position of Manager, Family Services was a VPS-6 classified position, a permanent ongoing role, and one which reported to an Executive Director. She further conceded that the position of Principal Policy Advisor was a VPS6 position, a permanent ongoing role, reported to an Executive Director and was within her chosen career stream and direction.*

52. *In the above circumstances, DHS submits that if the Commission were to find that DHS was obliged to locate an alternative position for Ms. Robertson after the creation of the Executive Officer position of Manager, Placement and Support, the positions which were offered to her were those nearest in status and remuneration to her former position. Accordingly, DHS met its obligations pursuant to clause 12 of Schedule 14 of the Act.*

Conclusion

53. *In summary, DHS submits the following:*

a. *Upon her return from maternity leave on 29 March 2004, Ms. Robertson returned to the position she occupied prior to her departure on maternity leave on 29 March 2003. By that time, the position was entitled Manager, Out of Home Care and Specialist Support (VPS6). Accordingly, DHS complied with its obligations pursuant to clause 48.1 of the 2004 Agreement and in particular, clause 12 of Schedule 14 of the Act.*

b. *While Ms. Robertson was on maternity leave, DHS created the new executive officer position of Manager, Placement and Support (EO3). The new position would be responsible for the management of the out of home care and specialist support function and assume the management duties performed by the position of Manager, Out of Home Care and Specialist Support. Ms. Robertson was fully informed of the creation of the new position, both verbally and in writing, and was encouraged to apply for the new position.*

c. *While Ms. Robertson applied for the new position, she did not participate in the merits based selection process used to appoint the applicants and failed to attend a second interview for the new position. Her application for the new position was unsuccessful.*

d. *Ms. Robertson continued to occupy the position of Manager, Out of Home Care and Specialist Support until Mr. Clements was appointed to the position of Manager, Placement and Support on 6 June 2004. During that period, and contrary to her assertions, duties and responsibilities were not removed from her and allocated elsewhere. Further, she was not subjected to any bullying or harassment.*

e. *If the Commission is not satisfied that DHS returned Ms. Robertson to the position she occupied prior to her departure on maternity leave (see sub-paragraph a. above), the Commission can be satisfied that it has complied with its obligation pursuant to clause 12(3) of Schedule 14 of the Act to return Ms. Robertson to another position which is "nearest in status and remuneration" to the position she occupied before she went on maternity leave. Since 6 June 2004, DHS has offered Ms. Robertson a total of 11 positions. All of those positions have been at the classification of VPS6 and at the same level of remuneration which Ms. Robertson received as Manager, Out of Home Care and Specialist Support. Additionally, a number of those positions report to a director and are in Ms. Robertson's area of experience and expertise.*

f. *Ms. Robertson seeks an order that the Commission appoint her to the position of Manager, Placement and Support (EO3). By virtue of the implied constitutional power outlined in *Re AEU*, the Commission does not have the power to so order. Further, as the Commission is exercising powers pursuant to s. 170LW of the Act in respect of the 2004 Agreement, it cannot order that Ms. Robertson be appointed to an Executive Office position in circumstances where the 2004 Agreement sets out the terms and conditions of VPS classified positions, and not those of executive officers. However, if the Commission finds that it does have the power to so order, DHS submits that it should exercise its discretion not to grant the order sought by Ms. Robertson.*

54. *In the above circumstances, DHS submits that the Application ought to be dismissed."*

[52] The DHS filed the following answers to questions (Exhibit DHS-21) [footnotes omitted]:

“We refer to the Directions issued by the Commission by email on 11 October 2005. As requested, we set out below the Respondent’s answers in relation to each of the questions asked by the Commission:

- 1. What was Ms Robertson’s actual position title at the time she began maternity leave on 29 March 2003 — was it Manager Service Development or was it Manager OHCSSS?**

At the time she commenced maternity leave on 29 March 2003, Ms Robertson occupied the position of Manager, Service Development (VPS-5). In July 2003, as a consequence of an increase to the duties and responsibilities of the position and the finalisation of a restructure within the Child Protection and Juvenile Justice Branch, the position was retitled ‘Manager, Out of Home Care and Specialist Support’ (VPS-5).

Upon her return from maternity leave on 29 March 2004, Ms Robertson returned to the position of Manager, Out of Home Care and Specialist Support (her original position) within the Child Protection and Juvenile Justice Branch. However, as a consequence of the implementation of the new Victorian Public Service classification structure, this position had been reclassified from a VPS5 level position to a VPS-6 level position while Ms Robertson was on maternity leave.

- 2. If the position Ms Robertson actually held on 29 March 2003 was Manager Service Development, what was the position description for that position?**

The Respondent is unable to locate a position description for the Manager Service Development position.

- 3 What was Ms Robertson’s actual rate of remuneration immediately before she began maternity leave on 29 March 2003?**

\$80,869.00 per annum

- 4 When did her position title change to Manager OHCSSS?**

As noted above, the title of Ms Robertson’s position changed from Manager Service Development to Manager, Out of Home Care and Specialist Support in July 2003 as a consequence of an increase to the duties and responsibilities of the position and the finalisation of a restructure within the Child Protection and Juvenile Justice Branch.

- 5 When did her VPS classification change from VPS5 to VPS6?**

The position of Manager Out of Home Care and Specialist Support was reclassified from a VPS-5 level position to a VPS-6 level position as a consequence of the Department’s implementation of the new Victorian Public Service classification structure. The re-classification took effect in relation to Ms Robertson’s position on 1 November 2003.

- 6. Did the rate of remuneration change — if so when?**

Ms Robertson’s remuneration did not alter as a consequence of the reclassification.

7. *What was Ms Robertson's term or tenure in the position she held at 29 March 2003?*

Ms Robertson's employment as a VPS officer in March 2003 was permanent and ongoing, subject to the terms and conditions of the Victorian Public Service (Non-Executive Staff) Certified Agreement 2001.

8. *Did this tenure/term change from July 2003?*

No. The only change was the retitling of the position in July 2003."

Findings

[53] Taking into account of all of the evidence and the submissions in this matter I find the following facts to be established on the balance of probabilities:

1. The position Ms Robertson held at 29 March 2003 was that of Manager Service Development at the VPS-5 level and at a remuneration of \$80,869.00 per annum (see [11] hereof). This position had a financial delegation of \$5,000, four direct reports and 14 subordinate staff with a total staff budget of approximately \$1,000,000 (see [13] hereof).
2. Ms Robertson commenced maternity leave on 29 March 2003 and pursuant to the provisions of s.170KB and Schedule 14 of the Act she was entitled on her return from 12 months maternity leave:
 - in most circumstances, to return to the position she held before the leave was taken (Schedule 14, cl 1(8); or
 - in circumstances where the position she held no longer exists but she is qualified for, and can perform the duties of, other positions in DHS, DHS must employ her in whichever of those positions is nearest in status and remuneration to the position she held immediately before she began maternity leave (Schedule 14, cl 12(2) and (3)).
3. During the period of 12 months in which Ms Robertson was on maternity leave, a continuous unfolding of major changes and events occurred which impacted on the position she held of Manager Service Development at the VPS-5 level:
 - The Victorian Government in June 2003 announced major policy initiatives in the Child Protection field which led to a substantial increase in the responsibility, workload, political sensitivity and accountability of the OHCSSS unit (see [15] hereof).
 - In July 2003 the position of Manager Service Development ceased to exist and was replaced by the position of Manager OHCSSS at the VPS-5 level with a new job description, enhanced functions, and responsibilities (see [16] hereof).
 - On 1 November 2003 Ms Robertson's VPS-5 level within DHS was re-classified to the VPS-6 level as part of the new Victorian Public Service Classification Structure (see [17] hereof).

- In late November 2003, as a result of an initiative by Mr Hall, DHS allocated a Senior Officer position at the EO3 level to the OHCSSS area and it was decided that the functions within the OHCSSS area would all report to that EO3 position once recruitment for that position was completed (see [19] hereof).
- Whilst DHS should have consulted with Ms Robertson on the impact of this decision on her position in compliance with the provisions of cl 15 of the 2001 Agreement any time from late November 2003 this consultation did not begin to occur until 9 January 2004 when Ms Callister rang Ms Robertson at home (see [21] and [22] hereof).
- Ms Robertson took exception to what was occurring in relation to the allocation of the EO3 position to the OHCSSS and began a grievance process with DHS on 12 January 2004, immediately after Ms Callister rang her (see [25] hereof).
- On 24 January 2004 DHS advertised in “*The Age*” for the EO3 position under the titled of “*Manager, Placement and Support*”.
- Ms Robertson was encouraged by Ms Callister and others within DHS to apply for the EO3 position of Manager, Placement and Support (see for example [21] hereof).
- Ms Robertson told DHS on 6 February 2004 that when she completed her maternity leave on March 2004 she wished to “*return to the position that I held prior to commencing maternity leave – Out of Home Care and Specialist Support Services with the same duties and responsibilities currently assigned to this role*” (see [30] hereof).
- On 29 March 2004 Ms Robertson returned from maternity leave and took up the position of Manager OHCSSS at the VPS-6 level (see [33] hereof). There appears no dispute between the parties that this was the position nearest in status to that held by Ms Robertson before she went on maternity leave, nor that she was paid the same remuneration subject to annual increments.
- Ms Robertson did not attend the final interviews for short-listed candidates for the EO3 position of Manager Placement and Support and on 3 June 2004 Ms Robertson was informed that she was not being appointed to the EO3 position, which had a salary range commencing at \$110,000, financial delegations of \$50,000 and a program budget of \$1.6 million and a staff budget of around \$2 million (see [40] and [42] hereof).
- The position of Manager Placement and Support at the EO3 level was not the position held by Ms Robertson prior to her going on maternity leave on 29 March 2003, nor was it the position of Manager OHCSSS which Ms Robertson took up in DHS on the return from maternity leave on 29 March 2003. It was a fresh position at a range well above that of VPS-6 positions in status and remuneration. Whilst a number of its duties may appear similar to those required of the Manager OHCSSS they were required to be fulfilled at the higher level of a member of the Executive Officer echelons of DHS. The position had major additional functions, responsibilities, financial delegations, staff oversight and budget responsibilities all of which made it a position very different in status and responsibility from that

of a VPS-6 level officer. For a person to secure an appointment to such a position they would be required to go through a proper selection process.

[54] Taking into account those findings I further find that:

1. The position of Manager Service Development held by Ms Robertson held at 29 March 2003 had ceased to exist by July 2003 and had been replaced by a new position of Manager OHCSSS with enhanced duties and responsibilities beyond those of the position of Manager Service Development. It was therefore not possible for DHS to allow Ms Robertson to return to the position she held before her maternity leave commenced on 29 March 2003. I do not accept the submission of CPSU (CPSU-5, cl 26) that this is a situation analogous to reinstatement under the termination of employment provisions of the Act.
2. When Ms Robertson returned from maternity leave on 29 March 2004 she was placed by DHS in the nearest position in status and remuneration to the position she held immediately before she began maternity leave, that of Manager OHCSSS at the VPS-6 level (see [34] hereof).
3. The advertising and filling of the EO3 position of Manager Placement and Support from 24 January 2004 to 24 August 2004, when Mr Clements was appointed to that position, are quite separate matters from the requirement for fulfilment by DHS of its obligation to Ms Robertson in relation to the parental leave provisions of Schedule 14 of the Act.
4. Nothing in the evidence before me indicates any lack of good-faith on the part of DHS or Mr Hall or Ms Callister in relation to this matter or any intention on any of their parts to mistreat Ms Robertson or deny her her proper entitlements under the Act and the 2001 Agreement.
5. DHS on 29 March 2004 fulfilled its obligations to Ms Robertson and complied with the requirement of Schedule 14 of the Act and its obligations under the Agreement to place her in the position nearest in status and remuneration as to the position which she had held on 29 March 2003, a position which no longer existed.
6. DHS has offered Ms Robertson a significant number of alternative VPS-6 status and remuneration positions since June 2004 and Ms Robertson has declined all of them and DHS has at all times made appropriate efforts to comply with its obligations under the Act and the 2001 Agreement and has not sought to avoid its obligations to Ms Robertson.

[55] Time does not stand still while a person is on paternity leave. Nor does it stand still after they return from paternity leave. The Act points to two specific moments in time for the Commission to consider, the date immediately before a person went on maternity leave and the date on which they return to work after that period of maternity leave. It does not require that there be no change affecting a position between those dates or after the date of return from maternity leave.

Ms Robertson's rights in this matter are those conferred by the Act and the 2001 Agreement and no other. Those rights are there to protect a person who takes parental leave, not to enable

a person on parental leave from requiring their employer to freeze all activity regarding the status or duties of a particular position. Life goes on at work, even while people are on parental leave. Nor is it required to stand still when a person returns from parental leave.

Decision

[56] I do not find in favour of the CPSU's application in this matter and specifically decline to issue the orders which it seeks.

Recommendation

[57] I recommend that DHS now offer to Ms Robertson all VPS-6 Level 1 status and remuneration positions which are currently available or which become available between now and 30 November 2005 with a view to Ms Robertson being permitted to indicate her preference for one of those positions by that date.

[58] I recommend that Ms Robertson bring this long drawn out saga to a swift conclusion by accepting from amongst those positions currently on offer within DHS a VPS-6 Level 1 status and remuneration position within DHS at the earliest opportunity but in any event by no later than 30 November 2005.

BY THE COMMISSION:

COMMISSIONER

Decision Summary

Enterprise dispute – certified agreement – dispute over application of agreement – s170LW Workplace Relations Act 1996 – parental leave provisions – State government administration – union contends employee denied right to return to position held immediately before maternity leave - employer contends it was not required to return employee to position held prior to proceeding on maternity leave as the position no longer exists – union further contends that if Commission finds position no longer exists, employer has not provided employee with comparable position nearest in status and remuneration to position held immediately prior to maternity leave – held: position formerly held by employee replaced by new position with enhanced duties and responsibilities – on return from maternity leave employee placed in nearest position in status and remuneration – filling of different position separate matter from respondent's obligation to returning employee – no evidence to support contention respondent or employees of respondent acted in anything other than good faith or mistreated employee or denied her entitlements – respondent discharged its responsibility to employee – employee declined number of alternative positions offering different status and remuneration – respondent complied with its obligations under Act and terms of Agreement – declined to issue orders sought by applicant

– recommended respondent offer employee all positions at nominated level and remuneration currently available with view to employee indicating preference for one position by specified date – recommend employee bring long drawn out saga to swift conclusion by accepting one of those positions.

CPSU, the Community and Public Sector Union and Department of Human Services

C2005/2376

PR963982

Grainger C

Melbourne

26 October 2005

Citation: *CPSU, the Community and Public Sector Union and Department of Human Services*, Grainger C, 26 October 2005 [PR963982]

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